Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

JEFFREY LOYD, et al.,

Petitioners,

v.

ALABAMA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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90 pp

QUESTIONS PRESENTED FOR REVIEW

This case presents three questions involving conflicts among the circuit courts of appeal:

1. May an applicant intervene to terminate a judgment in federal court without satisfying the standing requirements of Article III?

2. Does an applicant have a sufficient "interest" for intervention of right under Federal Rule of Civil Procedure 24(a)(2) when it is neither a party to the judgment it seeks to terminate nor directly affected by the relief provided therein?

3. By compelling Article III courts to reopen final injunctive judgments in jail and prison litigation under a standard not in effect at the time the judgments were entered, does the immediate termination provision of the Prison Litigation Reform Act, 18 U.S.C. § 3626(b)(2), violate the separation of powers doctrine and the Due Process Clause?

PARTIES TO THE PROCEEDING

Petitioners

Jeffrey Loyd, Bruce Capshaw, Larry Dempsey, Perry Esslinger, Undral Davis, Gary Bryant, Calvin Evans, Thomas Paschal, Phillip Clanton, Joseph Marsh, Jesse Grider, Joey Miller, Brad Waldrop, and the class of all inmates at the Jackson County Jail in Scottsboro, Alabama.

Respondents (Attorney General and State Defendants)

Bill Pryor, Attorney General of Alabama; Morris Thigpen, Tommy Herring, Ron Jones, and Joe Hopper, former Commissioners of the Alabama Department of Corrections; Michael Haley, current Commissioner; Alabama Department of Corrections; Lyle Haas, Administrator of Jackson County Department of Health; Alabama Department of Public Health.

County Defendants and Cross-Claimants

Jackson County, Alabama; Houston Kennemer, Calvin Durham, Bill Payne, Marvin Wells, O.Z. Brown, Ralph Eustace, Buddy Harris, Eddie Smith, and J.D. Atkins, former and current members of the Jackson County Commission; Mike Wells, Jackson County Sheriff; James Nevels, head jailer of the Jackson County Jail

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW xii

JURISDICTION xii

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED xii

STATEMENT UNDER RULE 29.4(b) 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 5

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE LONGSTANDING CIRCUIT SPLIT AS TO WHETHER A PARTY SEEKING TO INTERVENE IN FEDERAL COURT MUST SATISFY THE STANDING REQUIREMENTS OF ARTICLE III 5

II. THIS COURT SHOULD GRANT CERTIORARI TO DEFINE WHAT QUALIFIES AS A SUFFICIENT "INTEREST" FOR INTERVENTION OF RIGHT UNDER FEDERAL RULE OF CIVIL PROCEDURE 24(a)(2) 11

III. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE TERMINATION PROVISION OF THE PRISON LITIGATION REFORM ACT, 18 U.S.C. § 3626(B)(2), VIOLATES THE PRINCIPLE OF SEPARATION OF POWERS AND THE DUE PROCESS CLAUSE 15

A. Separation of Powers 16

B. Due Process 23

CONCLUSION 26

APPENDIX

Loyd v. Alabama Department of Corrections, No. 98-6189, ___ F.3d ___, 1999 WL 331874 (11th Cir. May 26, 1999) A-1

Loyd v. Herring, Civil Action No. 92-N-0058-NE (entered Jan. 27, 1998) A-19

Consent Decree (entered Nov. 7, 1994) (Excerpts) A-21

Permanent Injunction (entered Jan. 12, 1995) A-41

Consent Decree (entered Mar. 17, 1995) A-43

TABLE OF AUTHORITIES

CASES

Allen v. Wright, 468 U.S. 737 (1984) 8

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 7-8, 10

Associated Builders & Contractors v. Perry, 16 F.3d 688 (6th Cir. 1994) 6

Baker v. Carr, 369 U.S. 186 (1962) 8

Benjamin v. Jacobson, 172 F.3d 144 (2d Cir. 1999) 20

Board of Educ. v. Dowell, 498 U.S. 237 (1991) 17, 25

Bridge Co. v. United States, 105 U.S. 470 (1881) 20

Brown v. Board of Educ., 347 U.S. 473 (1954) 21

Building and Const. Trades Dept., AFL-CIO v. Reich, 40 F.3d 1275 (D.C. Cir. 1994) 5

Chiles v. Thornburgh, 865 F.2d 1197 (11th Cir. 1989) 5-6

City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157 (1997) 20

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 8

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 24

Conservation Law Found. of New England, Inc. v. Mosbacher, 966 F.2d 39 (1st Cir. 1992) 12

Curry v. Regents of Univ. of Minn., 167 F.3d 420 (8th Cir. 1999) 6, 14

Daggett v. Comm'n on Governmental Ethics, 172 F.3d 104 (1st Cir. 1999) 6

Diamond v. Charles, 476 U.S. 54 (1986) 6-8, 10

Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 2375 (1998) 4, 16, 18, 23

Eastern Enters. v. Apfel, 524 U.S. 498, 118 S. Ct. 2131 (1998) 24

FDIC v. Kraft, 157 F.3d 697 (9th Cir. 1998) 8

Flast v. Cohen, 392 U.S. 83 (1968) 8

Francis v. Chamber of Commerce, 481 F.2d 192 (4th Cir. 1973) 13

Freeman v. Pitts, 503 U.S. 467 (1992) 17

Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 2374 (1998) 19

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 12

Greene v. United States, 996 F.2d 973 (9th Cir. 1993) 14

Hodges v. Snyder, 261 U.S. 600 (1923) 23-24

Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392 (9th Cir. 1995) 13

Imprisoned Citizens Union v. Ridge, 169 F.3d 178 (3d Cir. 1999) 19

Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 2366 (1998) 19

JAK Productions, Inc. v. Wiza, 986 F.2d 1080 (7th Cir. 1993) 22

Johnston v. Cigna Corp., 14 F.3d 486 (10th Cir. 1993), cert. denied, 514 U.S. 1082 (1995) 23

Karcher v. May, 484 U.S. 72 (1987) 8

Keith v. Daley, 764 F.2d 1265 (7th Cir.), cert. denied, 474 U.S. 980 (1985) 13

Kleisser v. U.S. Forest Serv., 157 F.3d 964 (3d Cir. 1998) . . 12-13

Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994) 9

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) 23

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 24-25

Loyd v. Alabama Department of Corrections, ___ F.3d ___, 1999 WL 331874 (11th Cir. May 26, 1999) xii

Loyd v. Herring, Civil Action No. 92-N-0058-NE (*entered* Jan. 27, 1998) xii

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 12

Mausolf v. Babbitt, 85 F.3d 1295, 1299 (8th Cir. 1996) 6

McCullough v. Virginia, 172 U.S. 102 (1898) 23

Memphis v. United States, 97 U.S. 293 (1877) 23

Michigan State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997) 13

Mountain Top Condominium Assoc. v. Dave Stabbert Master Builder, Inc., 72 F.3d 361 (3d Cir. 1995) ... 14

Mova Pharmaceutical Corp. v. Shalala, 140 F.3d 1060 (D.C. Cir. 1998) 13

Newsweek, Inc. v. Florida Dept. of Revenue, 522 U.S. 442 (1998) 25

Nichols v. Hopper, 173 F.3d 820 (11th Cir. 1999) 4, 16

Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855) 18-20, 24

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 16-25

Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996), cert. denied, 520 U.S. 1277 (1997) 19

Purcell v. BankAtlantic Financial Corp., 85 F.3d 1508 (11th Cir.), cert. denied, 519 U.S. 867 (1996) 5

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) 16-18, 25

Ruiz v. Estelle, 161 F.3d 814 (5th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 2046 (1999) 6, 11

Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1982) 13

Sierra Club v. Espy, 18 F.3d 1202 (5th Cir. 1994) 14

Sierra Club v. Morton, 405 U.S. 727 (1972) 8, 12

Solid Waste Agency v. United States Army Corps of Engineers, 101 F.3d 503 (7th Cir. 1996) 6

Southern Christian Leadership Conference v. Kelley, 747 F.2d 777 (D.C. Cir. 1984) 13

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S. Ct. 1003 (1998) 8

System Fed'n v. Wright, 364 U.S. 642 (1961) 20

Taylor v. United States, ___ F.3d ___, No. 97-16069, 1999 WL 402748 (9th Cir. June 18, 1999) (en banc) 16, 18, 20

Tonya K. v. Board of Educ., 847 F.2d 1243 (7th Cir. 1988) . 24

United States Postal Service v. Brennan, 579 F.2d 188 (2d Cir. 1978) 6

United States v. 36.96 Acres of Land, 754 F.2d 855 (7th Cir. 1985), cert. denied, 476 U.S. 1108 (1986) 6, 13

United States v. O'Grady, 89 U.S. (22 Wall) 641 (1875) ... 24

Warth v. Seldin, 422 U.S. 490 (1975) 8

Yniguez v. State of Arizona, 939 F.2d 727 (9th Cir. 1991) .. 6

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Article III ..... passim

U.S. Const., Amend. V xiii

18 U.S.C. § 3626(a)(3)(F) 11-12

18 U.S.C. § 3626(b)(2) ..... passim

28 U.S.C. § 1254(1) xi

28 U.S.C. § 1331 1

28 U.S.C. § 1343 1

28 U.S.C. § 2403(a) 1

RULES

Federal Rule of Civil Procedure 24 ..... i, xiv, 10-15

Federal Rule of Civil Procedure 60 . . . . . 18, 25

S. 248, 106th Congress, 1st Sess. 21

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OPINIONS BELOW

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JURISDICTION

The court of appeals entered its judgment on May 26, 1999. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. III

> **Section. 1.** The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> **Section. 2.** The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their

Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between citizens of different States;–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

. . . .

* * * * *

U.S. Const., amend. V

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

* * * * *

Prison Litigation Reform Act
18 U.S.C. § 3626(b)

(2) Immediate Termination of Prospective Relief. -- In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

(3) Limitation. -- Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means necessary to correct the violation of the Federal right.

* * * * *

Federal Rule of Civil Procedure 24

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT UNDER RULE 29.4(b)

Since the proceeding draws into question the constitutionality of the Prison Litigation Reform Act, 18 U.S.C. § 3626(b)(2), and neither the United States nor any agency, officer, or employee thereof is a party, 28 U.S.C. § 2403(a) may be applicable. In the case below, the Eleventh Circuit Court of Appeals, pursuant to § 2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn into question.

STATEMENT OF THE CASE

Petitioners are the class of all inmates who are or will be confined at the Jackson County Jail (hereinafter "the jail") in Scottsboro, Alabama. They brought this action in 1992 seeking to remedy unconstitutional conditions at the jail, including the total lack of inmate exercise, severely unsanitary conditions, inadequate medical care and staffing, and lack of access to legal materials. In their *Complaint*, petitioners sued Jackson County, members of the Jackson County Commission, the Jackson County Sheriff, the Chief Jailer of the Jackson County Jail, the Administrator of the Jackson County Department of Health, and the Alabama Department of Corrections and its Commissioner. Jackson County and the county commissioners filed a cross-claim against the Alabama Department of Corrections and its Commissioner.[1]

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1. The district court had jurisdiction over petitioners' *Complaint* pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). Petitioners maintain in this petition that the district court did not have jurisdiction under Article III to hear the Attorney General's motion with respect to the November 1994 *Consent Decree*, and that the Attorney General continues to lack Article III standing to defend the district court's decision granting this motion now. See infra Section I.

On November 7, 1994, the district court approved and adopted a *Consent Decree* settling all issues raised in petitioners' lawsuit against Jackson County, the county commissioners, the sheriff, and the chief jailer. This *Consent Decree* (hereinafter "November 1994 *Consent Decree*," App. at A-21) addresses conditions and practices at the existing jail, requires the building of a new jail, and sets forth standards to be used in the new jail's management. The Alabama Attorney General is not a party to this decree, nor does it affect state agencies in any way.

On January 12, 1995, the district court entered a *Permanent Injunction* (App. at A-41) requiring the Alabama Department of Corrections to remove inmates sentenced to state prison from the jail in a timely manner. On March 17, 1995, the district court approved and adopted a second *Consent Decree* settling issues raised by the lawsuit against the Department of Corrections, its commissioner, the Alabama Department of Public Health, and the Administrator of the Jackson County Health Department. This decree (hereinafter "March 1995 *Consent Decree*," App. at A-43) governs the responsibilities of these state agencies to inspect and report on conditions in the jail.

The *Consent Decrees* and *Permanent Injunction* continued in effect until July 2, 1997, when the Alabama Attorney General and the Commissioner of the Alabama Department of Corrections filed a motion to terminate pursuant to 18 U.S.C. § 3626(b)(2) of the Prison Litigation Reform Act (PLRA), which entitles a "defendant or intervener" to the immediate termination of any "prospective relief" in a jail or prison conditions case that was approved or granted in the absence of particular findings. On July 9, 1997, the district court ordered the Attorney General to amend his motion "to clearly state whether he moves for relief on behalf of the parties named in the motion or whether he purports to act on behalf of all the defendants and if he purports to act on behalf of all the defendants, state his authority for doing so." On July 23, the Attorney General responded that an Alabama statute authorizes

him to appear in the federal courts "in any case in which the state may be interested in the result," that he represents the defendants Alabama Department of Corrections and Department of Public Health, and that he is an "intervenor" under § 3626(b)(2). The Attorney General never moved to intervene under Federal Rule of Civil Procedure 24, nor has he relied on the only provision defining the conditions for intervention under the PLRA, 18 U.S.C. § 3626(a)(3)(F).

Petitioners filed their *Opposition* to the Attorney General's motion on August 1, 1997, and challenged his standing in a supplemental memorandum of law on January 12, 1998. On January 13, 1998, the Jackson County Sheriff and county defendants filed a *Petition for Order to Show Cause Why the Commissioner of the Alabama Department of Corrections Should Not Be Held in Contempt* for his failure to comply with the *Permanent Injunction* requiring prompt removal of state inmates from the jail. The sheriff and county defendants never moved to terminate any of the judgments in this case. At a hearing on January 27, 1998, their counsel stated, "[W]e're somewhat caught in the middle between wishing to have the consent decree done away with, and needing the consent decree in some fashion. . . . [F]rankly, the consent decree has been a vehicle by which we can make these changes. It has allowed the county and the Sheriff's Department to do these things without some of the political problems that would have been caused otherwise, as the Court is well aware."

At this hearing, the district court refused to allow petitioners to present evidence of a "current and ongoing" violation of their constitutional rights, pursuant to § 3626(b)(3). That same day the court granted the Attorney General's motion, terminating all three judgments in the case: the November 1994 *Consent Decree*, the March 1995 *Consent Decree*, and the *Permanent Injunction*. App. at A-19-20.

Petitioners appealed to the Eleventh Circuit. The Attorney General defended the district court's decision in a brief and at oral

argument. The Jackson County defendants filed a brief stating that "it appears to the Jackson County Defendants that the Attorney General had standing to move for termination of the consent decrees and the permanent injunction in this case pursuant to the Prison Litigation Reform Act." *Brief of (County Defendant) Appellees* at 10-11.[2] Counsel for the county defendants did not appear for oral argument in the Eleventh Circuit.

Citing two earlier decisions -- Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 2375 (1998), and Nichols v. Hopper, 173 F.3d 820 (11th Cir. 1999) -- the court of appeals rejected petitioners' challenge to the constitutionality of § 3626(b)(2). App. at A-13. It unanimously held that the district court erred in refusing to allow petitioners to present evidence of current unconstitutional conditions at the jail. App. at A-10-11. However, the majority rejected petitioners' argument that Article III barred the Attorney General from seeking, as an intervenor, termination of the November 1994 *Consent Decree* -- the jail conditions decree to which neither he nor his clients are a party. App. at A-4. Judge Barkett dissented as to this holding: "I believe that the majority errs in holding that the Attorney General was entitled to seek termination of the entire November 1994 decree without satisfying Article III standing requirements." App. at A-14.

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2. While the Jackson county defendants did not "take issue" with the district court's order on termination, they stated that "[i]n the best of all worlds, the Jackson County Defendants would prefer for the permanent injunction which requires timely transfer of state inmates into DOC custody to remain in place." *Brief of (County Defendant) Appellees* at 8.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE LONGSTANDING CIRCUIT SPLIT AS TO WHETHER A PARTY SEEKING TO INTERVENE IN FEDERAL COURT MUST SATISFY THE STANDING REQUIREMENTS OF ARTICLE III.

This case presents a critical question of constitutional law and civil procedure that has divided the circuit courts for many years. The panel majority below held that the Attorney General of Alabama may proceed with his motion to terminate the November 1994 *Consent Decree*, even though neither he nor any of his clients are a party to that order, and even though none of the actual parties to that order have moved to terminate it. In reaching this holding, the panel majority reiterated the Eleventh Circuit's position that a party seeking to intervene before a district court need not have standing under Article III, but must instead only satisfy the requirements of Federal Rule of Civil Procedure 24. App. at A-4 (citing Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989)); accord Purcell v. BankAtlantic Financial Corp., 85 F.3d 1508, 1512 n.4 (11th Cir.), cert. denied, 519 U.S. 867 (1996).

A circuit split has long existed with respect to this question. Chief Judge Richard Arnold summarized this split as follows:

> By way of illustration, at least one circuit has held that Article III standing is required to intervene, see, e.g., Building and Const. Trades Dept., AFL-CIO v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994); another has stated that, while Article III standing is not required, it is "relevant" to identifying the "interest" required for intervention under Rule 24, see, e.g., Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989);

> others have concluded that standing is not required for intervention, see, e.g., United States Postal Service v. Brennan, 579 F.2d 188, 190 (2d Cir. 1978); Associated Builders & Contractors v. Perry, 16 F.3d 688, 690 (6th Cir. 1994); Yniguez v. State of Arizona, 939 F.2d 727, 731 (9th Cir. 1991); and still another has suggested that Rule 24 requires an interest even "greater than the interest sufficient to satisfy the standing requirement." See, e.g., United States v. 36.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985), cert. denied, 476 U.S. 1108 (1986).

Mausolf v. Babbitt, 85 F.3d 1295, 1299 (8th Cir. 1996) (internal citations modified). The Mausolf court concluded that the Constitution does require putative intervenors to have Article III standing to litigate their claims in federal court. Id. at 1300; accord Curry v. Regents of Univ. of Minn., 167 F.3d 420, 422 (8th Cir. 1999). See also Daggett v. Comm'n on Governmental Ethics, 172 F.3d 104, 109 (1st Cir. 1999) ("Interestingly, the circuits are divided as to whether an intervenor as of right must possess standing under Article III, and the Supreme Court has reserved judgment on the point. This circuit has not taken a position on the issue nor need we decide it here . . . ."); Ruiz v. Estelle, 161 F.3d 814, 830-32 (5th Cir. 1998) (holding that Article III does not require intervenors to possess standing), cert. denied, ___ U.S. ___, 119 S. Ct. 2046 (1999); Solid Waste Agency v. United States Army Corps of Engineers, 101 F.3d 503, 507 (7th Cir. 1996) (clarifying that Seventh Circuit requires intervenors to have "minimal standing required by Article III"). Thus, the Second, Fifth, Sixth, Ninth, and Eleventh Circuits are in direct conflict with the Seventh, Eighth, and D.C. Circuits on this question.

In Diamond v. Charles, 476 U.S. 54 (1986), this Court observed the existence of "anomalous decisions in the Courts of Appeals" on intervenor standing, id. at 68 & n.21, but pretermitted this question

because the interests claimed by the intervenor in district court, a pediatrician seeking to defend an Illinois abortion statute, were plainly "insufficient to confer standing on him to continue this suit now," id. at 69. Because the state of Illinois had not appealed from the adverse ruling in the court of appeals, there was no Article III "case" or "controversy" in this Court. Id. at 63-64. The pediatrician's status as an intervenor in the lower courts did not keep the case alive because he was unable to assert an injury in fact. Id. at 65-66. This Court thus dismissed the pediatrician's appeal for want of jurisdiction. See also Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997) (citing Diamond, 476 U.S. at 68: "An intervenor cannot step into the shoes of the original party unless the intervenor independently 'fulfills the requirements of Article III.'").

In the case below, Judge Barkett wrote in dissent that this Court's ruling in Diamond prevented the Alabama Attorney General from pursuing the termination motion: "Because the Attorney General alone asked the district court to terminate the November 1994 consent decree, it must show that it has a direct stake in whether or not that consent decree will continue in force." App. at A-15. The panel majority disagreed, observing that the Diamond Court had left open the question whether a party seeking to intervene before a district court had to satisfy the requirements of Article III. The panel majority then found that because the county defendants, as opposed to the Attorney General and his state clients, had "remained active in opposing the appeal of the district court's order," a valid "case or controversy" existed. App. at A-4 n.2. The majority opinion thus squarely presents the issue not decided in Diamond v. Charles. See 6 James W. Moore et al., Moore's Federal Practice ¶ 24.03[2][d] (3d ed. 1999) ("The conflict acknowledged by the Court in Diamond v. Charles remains unresolved.").

The importance of this issue extends well beyond the facts of this case. The "case" or "controversy" requirement of Article III ensures the presence of the "concrete adverseness which sharpens the

presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962), cited in Diamond, 476 U.S. at 61-62. The "core component" of standing doctrine is "derived directly from the Constitution." Allen v. Wright, 468 U.S. 737, 751 (1984). To satisfy Article III, a party must have suffered or will imminently suffer an injury that is "both real and immediate, not conjectural or hypothetical." City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983). The injury must be *personal*; a party's "mere interest in a problem, no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient." Sierra Club v. Morton, 405 U.S. 727, 739 (1972). Moreover, whatever injury the party asserts must be redressable by the federal court. As this Court has made clear, Article III standing does not exist where a party can gain only "psychic satisfaction" or "vindication of the rule of law" as a result of its involvement in a case. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, ___, 118 S. Ct. 1003, 1018-19 (1998); see also Arizonans for Official English, 520 U.S. at 64 ("An interest shared generally with the public at large in the proper application of the Constitution and laws will not do.").[3]

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3. The fact that the Attorney General and his client Alabama Department of Corrections are a party to other judgments entered in this action does not resolve their standing with respect to the November 1994 *Consent Decree*. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute *or of particular issues*." Allen v. Wright, 468 U.S. 737, 750-51 (1984) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)) (emphasis added). Put another way, the question is whether the party is entitled "to an adjudication *of the particular claims asserted*." Allen v. Wright, 468 U.S. at 752 (emphasis added). Whether there is an Article III case or controversy does not depend on the existence of a dispute between the original parties, but on the issues in dispute. Cf. Karcher v. May, 484 U.S. 72, 78 (1987) (holding that former legislators, who had intervened in their official capacities, did not have standing to proceed in individual or professional capacities); Flast v. Cohen, 392 U.S. 83, 102 (1968) (requiring nexus between "the litigant and the claim he presents"); FDIC v. Kraft, 157 F.3d 697, 706 (9th Cir. 1998)

(continued...)

Petitioners submit that the Attorney General's motion to terminate the November 1994 *Consent Decree* presents precisely the kind of dispute that the Framers intended to prohibit Article III courts from hearing. The Attorney General has not and cannot demonstrate that he suffers an injury in fact by the continuation of this *Consent Decree*. He is not a party to this judgment, nor is he the proper representative of the entities who are parties. Neither the Attorney General nor the Alabama Department of Corrections is placed under any duty as a result of this judgment. Its provisions impose duties and burdens on the sheriff and the county defendants alone.

This case raises questions about the Attorney General's standing at both the district court and appellate level. The Attorney General is the only person who has sought termination of the November 1994 *Consent Decree*. None of the parties to that judgment -- Jackson County, the Jackson County Commission and its members, the Jackson County Sheriff, or the Jackson County Jail Administrator -- filed a motion to terminate in the district court. See App. at A-14 (Barkett, J., dissenting). Indeed, counsel for the Jackson County defendants informed the court that his clients were "somewhat caught in the middle between wishing to have the consent decree done away with, and needing the consent decree in some fashion," and acknowledged that the decree has been "a vehicle" allowing "the county and the Sheriff's Department to do these things without some of the political problems that would have been caused otherwise." The Attorney General has never articulated the basis for his Article III standing in this matter. At most, he can claim a general interest in the conduct of county jail litigation in Alabama, or an interest in the harsh treatment of county detainees, or a concern about the balance of federal-municipal relations. Such interests,

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3. (...continued)
(named defendant lacked standing to assert counterclaim); Knight v. Alabama, 14 F.3d 1534, 1554-55 (11th Cir. 1994) (named defendants lacked standing to assert cross-claim or cross-appeal).

however, fail to establish the "concrete adverseness" requirement of Article III cases or controversies -- a requirement that is particularly critical where, as here, fundamental questions of federal statutory construction and constitutional law are posed. See infra Section III. Moreover, no injury claimed by the Attorney General is traceable to the continuation of the November 1994 *Consent Decree* or redressable by the district court.[4]

Petitioners also challenge the Attorney General's standing to defend the district court's ruling on appeal. Article III standing requirements must be met by both parties appearing in courts of first instance and those proceeding on appeal. Arizonans for Official English, 520 U.S. at 64 (citing Diamond, 476 U.S. at 62). The panel majority below stated that the county defendants "have remained active in opposing the appeal of the district court's order." App. at A-4 n.2. In fact, in their appellate brief the county defendants stated merely that they did not "take issue" with the district court's order on termination as it "appeared" to them that the Attorney General had standing to seek it under the PLRA. *Brief of (County Defendant) Appellees* at 8, 10-11. Counsel for the county defendants did not appear at oral argument. It is highly questionable whether such a stance by Jackson County gives rise to the sort of "case or controversy" required under Diamond, where the Court held that Illinois's "letter of interest" in the constitutionality of the challenged abortion statute was insufficient. See 476 U.S. at 62-64. However, even if the panel majority were correct in finding the county defendants' opposition sufficient in this case, the ability of the Attorney General to proceed without Article III standing remains an unresolved and disputed question.

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4. Indeed, petitioners dispute whether the Attorney General possesses even the sort of direct interest that makes him an appropriate intervenor under Federal Rule of Civil Procedure 24(a)(2). See infra Section II.

One other circuit court has considered the constitutionality of intervention under the PLRA. In Ruiz v. Estelle, 161 F.3d 814 (5th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 2046 (1999), the Fifth Circuit reversed a district court's denial of two Texas state legislators' motion to intervene in a pending prison conditions case under 18 U.S.C. § 3626(a)(3)(F). The court, however, limited its holding to the proposition that intervenors under § 3626(a)(3)(F) need not independently satisfy Article III standing requirements where "the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so." 161 F.3d at 830. In Ruiz the Texas Department of Criminal Justice (TDCJ), which was directly affected by the injunctive decree at issue, had already filed a termination motion under the PLRA. Because the TDCJ clearly had standing to file its motion, thus establishing a case or controversy under Article III, the intervention of the legislators, who sought "the same ultimate relief as the TDCJ," was permissible. Id. at 833. However, the Fifth Circuit cautioned: "*It is doubtful that, if [the legislators] were the only parties before the court seeking termination of (or other relief respecting) the Final Judgment, they would have sufficient standing so that the district court would be presented with an Article III case or controversy.*" Id. at 829 (emphasis added). This statement conflicts with the holding of the Eleventh Circuit below. In addition, as stated earlier, the view of the Fifth and Eleventh Circuits together on intervenor standing conflict with that of the Seventh, Eighth, and D.C. Circuits. These circuit conflicts warrant this Court's review and resolution.

II. THIS COURT SHOULD GRANT CERTIORARI TO DEFINE WHAT QUALIFIES AS A SUFFICIENT "INTEREST" FOR INTERVENTION OF RIGHT UNDER FEDERAL RULE OF CIVIL PROCEDURE 24(a)(2).

Even if the Attorney General does not need Article III standing to pursue termination of the entire November 1994 *Consent Decree*,

serious questions remain as to whether he has a sufficient "interest" to intervene of right in this matter pursuant to Federal Rule of Civil Procedure 24(a)(2).[5]

The courts of appeals are divided in their application of this rule. "Lack of guidance in the Advisory Committee Notes and a paucity of Supreme Court decisions on intervention of right have resulted in widely varying interpretations of the Rule 24(a) requirements." Cindy Vreeland, Comment, Public Interest Groups, Public Law Litigation, and Federal Rule 24(a), 57 U. Chi. L. Rev. 279, 283 (1990); see also Kleisser v. U.S. Forest Serv., 157 F.3d 964, 969 (3d Cir. 1998) (observing lack of "'precise and authoritative definition' of the interest that satisfies Rule 24(a)(2)"); Conservation Law Found. of New England, Inc. v. Mosbacher, 966 F.2d 39, 41 (1st Cir. 1992) ("[B]ecause the case law varies substantially between courts, no bright line of demarcation exists."); 6 James W. Moore et al., Moore's Federal Practice ¶ 24.03[2][a] (3d ed. 1999) ("[T]here is no authoritative definition of

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5. The Attorney General never filed a motion to intervene, but the Eleventh Circuit excused this failure as a "'nonprejudicial technical defect[]' in complying with Rule 24(c)." App. at A-8. Even though the Attorney General asserted below that he is an intervenor under PLRA § 3626(b)(2), the Eleventh Circuit did not approve his intervention under Fed. R. Civ. P. 24(a)(1), which allows intervention "when a statute of the United States confers an unconditional right to intervene." Section 3626(b)(2) does not confer a right to intervention, but only mentions without explanation that an "intervener" may file a motion to terminate. A different provision of the PLRA, 18 U.S.C. § 3626(a)(3)(F), defines the circumstances under which a person may intervene to seek termination – none of which apply in this case, which does not involve a "prisoner release order." The Attorney General has never cited § 3626(a)(3)(F) as support for his position. Furthermore, it is well established that Congress cannot provide standing by statute to parties who do not independently satisfy "the Article III minima." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992); Sierra Club v. Morton, 405 U.S. 727, 738 (1972). This petition therefore addresses the Attorney General's status as an intervenor under Rule 24(a)(2) – the provision relied upon by the Eleventh Circuit below.

precisely what kinds of interest satisfy the requirements of the rule. . . . Courts have adopted a variety of approaches and a wide range of terminology in discussing the issue of interest.").

For instance, some courts have required that a putative intervenor have a litigable interest in the proceeding, an interest that directly implicates the legal right of the intervenor such that he or she could maintain a separate claim. See, e.g., Mova Pharmaceutical Corp. v. Shalala, 140 F.3d 1060, 1074 (D.C. Cir. 1998); Southern Christian Leadership Conference v. Kelley, 747 F.2d 777, 780-81 (D.C. Cir. 1984); Francis v. Chamber of Commerce, 481 F.2d 192, 195 n.7 (4th Cir. 1973). The Seventh Circuit has interpreted the rule even more strictly, requiring an interest even greater than the interest sufficient to satisfy the standing requirement. See, e.g., Keith v. Daley, 764 F.2d 1265, 1268-70 (7th Cir.), cert. denied, 474 U.S. 980 (1985); United States v. 36.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985), cert. denied, 476 U.S. 1108 (1986). By contrast, the Sixth and Ninth Circuits have allowed intervention where the claimed interests were only "substantial" or "significant," not litigable. See, e.g., Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1245-46 (6th Cir. 1997); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1397-98 (9th Cir. 1995); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1982). See also Kleisser, 157 F.3d at 972 (holding that Rule 24(a)(2) requires interests that are "specific to them, . . . capable of definition, and . . . directly affected in a substantially concrete fashion by the relief sought," but not "remote or attenuated").

In allowing the Alabama Attorney General to proceed, the Eleventh Circuit majority below concluded that he has a sufficient interest to entitle him to intervene under Rule 24(a)(2). App. at A-5-6. It found that one provision of the November 1994 *Consent Decree* "directly affects the interests of the State of Alabama, even though the State is not a party to the consent decree." App. at A-6. The provision at issue deals with the removal of state inmates from the Jackson

County Jail: the Jackson County Sheriff must prepare and forward in a timely manner the appropriate documents to the Department of Corrections, and all county defendants must inform the monitor of "all unreasonable delays." See App. at A-6, A-33. It is clear, however, this provision does not place *any* duty upon the Department of Corrections. Neither the Department nor any other state agency is a party to it. See App. at A-23-24. A different order in this case, the *Permanent Injunction* (App. at A-41), obligates the Department to remove state inmates from the jail in a timely manner. The November 1994 *Consent Decree* merely obligates the county defendants to facilitate this removal. Thus, the Attorney General has no litigable interest in the termination of the November 1994 *Consent Decree*: neither he nor his clients are directly affected by its continuation. See supra Section I. The panel majority's decision nevertheless allowing him to intervene conflicts with the decisions of those circuits that require a litigable interest under Rule 24(a)(2).

In addition, the panel majority justified its decision on the basis that the cited provision of the November 1994 *Consent Decree* "impact[s] the economic ability of the State to have facilities available for the transfer." App. at A-6. While petitioners dispute this statement factually -- a judgment that imposes a duty solely on Jackson County does not impact the State of Alabama economically – as a matter of law, the circuits are split as to whether an economic interest in a matter satisfies Rule 24(a)(2). Compare Sierra Club v. Espy, 18 F.3d 1202, 1207 (5th Cir. 1994) (citing economic interest as basis for intervention under Rule 24(a)(2)) with Curry v. Regents of Univ. of Minn., 167 F.3d 420, 422 (8th Cir. 1999) (holding that economic interest alone is insufficient); Greene v. United States, 996 F.2d 973, 976 (9th Cir. 1993) (same); and Mountain Top Condominium Assoc. v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 366 (3d Cir. 1995) (while mere economic interest might be insufficient, interest in specific fund that is at risk satisfies rule).

Furthermore, as Judge Barkett observed in dissent, "the vast majority" of provisions in the November 1994 *Consent Decree* do not pertain to the State at all. App. at A-16. "The majority offers no reason why the Attorney General should be able to seek termination of those portions of the decree that only relate to the county defendants." Id. No other circuit allows an intervenor to seek termination of an entire judgment, under the PLRA or any other statute, that does not impair the intervenor's interests. Indeed, this result conflicts with the language of Rule 24(a) itself.

By refusing to require Article III standing of intervenors, and by allowing the Alabama Attorney General to pursue termination of a judgment that does not impose any duties or burdens on any state entity, the Eleventh Circuit has applied Fed. R. Civ. P. 24(a)(2) in a manner that effectively makes intervention available to anyone who has a conjectural, philosophical, or generalized interest in an ongoing federal case. This Court should review this case to resolve the circuits' widely varying approaches to the rule on intervention of right.

III. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE TERMINATION PROVISION OF THE PRISON LITIGATION REFORM ACT, 18 U.S.C. § 3626(B)(2), VIOLATES THE PRINCIPLE OF SEPARATION OF POWERS AND THE DUE PROCESS CLAUSE.

With respect to both consent decrees and the *Permanent Injunction* that the Attorney General and his state clients seek to terminate, petitioners challenge the termination provision of the PLRA, 18 U.S.C. § 3626(b)(2), as violative of the Constitution's separation of powers doctrine and Due Process Clause. This provision makes hundreds of federal court judgments vulnerable to immediate termination, upon motion by a government defendant or intervenor, if they do not include specific findings not required at the time they were entered. The Elev-

enth Circuit's decisions upholding § 3626(b)(2)[6] conflict with this Court's rulings in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992), and Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995), and, it appears, the recent decision of another circuit, see Taylor v. United States, ___ F.3d ___, No. 97-16069, 1999 WL 402748 (9th Cir. June 18, 1999) (en banc).[7]

A. Separation of Powers

In enacting § 3626(b)(2) of the PLRA, Congress has made an unprecedented assertion of power to require federal courts to revise and terminate final injunctive judgments of Article III courts. If this provision is constitutional, Congress has the power to interfere at will with constitutional judgments of the federal courts whenever they are embodied in injunctive orders. The implications of this holding go far beyond jail and prison litigation, placing Congress in the position of a court of revision in any injunctive case where the losing party has the resources to lobby for a different result.

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6. As the court below observed (App. at A-13), the Eleventh Circuit upheld § 3626(b)(2) as constitutional in Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 2375 (1998), and Nichols v. Hopper, 173 F.3d 820 (11th Cir. 1999).

7. Previously, a three-judge panel of the Ninth Circuit had held § 3626(b)(2) violates the separation of powers doctrine. Taylor v. United States, 143 F.3d 1178, 1185 (9th Cir. 1998). On en banc rehearing, the majority found that it did not have to resolve the constitutionality of § 3626(b)(2) because the judgment at issue "was interlocutory and disappeared when the final judgment was entered October 19, 1973." 1999 WL 402748, at *___. However, five members of the majority ruled in the alternative that it would violate the separation of powers doctrine to apply § 3626(b)(2) to the judgment in that case. Id. at *___. This ruling will presumably bind future termination cases in the Ninth Circuit. In dissent, Judge Wardlaw wrote that the majority decision departed from "the judicial mainstream of PLRA interpretation." Id. at *___.

Before enactment of § 3626(b)(2), there was no instance in our system of separated powers in which Congress decreed that Article III courts shall terminate final injunctive judgments in constitutional cases. As the Court observed in a similar context, "[t]hat prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed." Plaut, 514 U.S. at 230.

In Plaut, the Court stated the separation of powers principle most pertinent to this case: final judgments of an Article III court are immune from revision by the other branches. 514 U.S. at 234. Congress may not subject them, individually or in gross, id. at 228, to "a reopening requirement which did not exist when the judgment was pronounced," id. at 234. This is because the constitutional design "gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy -- with an understanding, in short, that 'a judgment conclusively resolves the case' because 'a judicial Power' is one to render dispositive judgments." Id. at 218-19 (citation omitted).

Section 3626(b) indisputably imposes a new reopening requirement. When the judgments were entered, they could be reopened only via the traditional power of an equity court, codified in Federal Rule of Civil Procedure 60(b), over its own injunctive judgments. Indeed, this Court has explicitly confirmed that an injunctive consent decree much like those in this case is "a final judgment that may be reopened only to the extent that equity requires," Rufo, 502 U.S. at 391.

Under that recognized equitable standard, a decree may be ended when defendants have complied for a reasonable period of time, have exhibited a good-faith commitment to the decree and the underlying law, and are "unlikely to return to [their] former ways." Board of Educ. v. Dowell, 498 U.S. 237, 247-50 (1991); accord Freeman v. Pitts, 503 U.S. 467, 491 (1992). Likewise under that standard, while the decree is in effect, it may be modified only if there is a "significant

change in circumstances" in either fact or law, and the proposed modification is "suitably tailored to the changed circumstance." Rufo, 502 U.S. at 383. These standards are very different from § 3626(b)(2)'s termination of judgments based on the lack of findings that were not required at the time they were entered.[8]

In upholding § 3626(b)(2) as constitutional, however, the Eleventh Circuit has asserted that consent decrees "are not final judgments for separation-of-powers purposes." Dougan v. Singletary, 129 F.3d 1424, 1426 (11th Cir. 1997). It cited the inherent power of federal courts to amend these decrees "as significant change in law and fact require." Id.[9] But Plaut rejected this same argument. The petitioners there had cited Federal Rule of Civil Procedure 60(b), which codifies that equitable power.[10] The Court stated: "Rule 60(b), which authorizes discretionary judicial revision of judgments in the listed situations and in other 'extraordinary circumstances,' does not impose any legisla-

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8. As five members of the Ninth Circuit summarized in Taylor:

> In a nutshell, Congress may change the law and, in light of changes in the law or facts, a court may decide in its discretion to reopen and set aside a consent decree under Fed. R. Civ. P. 60(b), see Rufo, 502 U.S. at 383-84, or refuse to enforce an executory decree pursuant to its inherent power, see Wheeling Bridge II, 59 U.S. (18 How.) at 431-32, but Congress may not direct a court to do so with respect to a final judgment (whether or not based on consent) without running afoul of the separation of powers doctrine. See Plaut, 514 U.S. at 227, 234-35.

1999 WL 402748, at *___.

9. In the decision below, the Eleventh Circuit made clear its view that § 3626(b)(2) applies to litigated judgments, such as the *Permanent Injunction* in this case, as well as consent decrees. App. at A-12.

10. While Plaut itself dealt with a money judgment, Rule 60(b) also codifies the requirements for revision of injunctive judgments.

tive mandate-to-reopen upon the courts, but merely reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity." 514 U.S. at 233-34 (citation omitted).

Moreover, the notion that a consent decree or other kind of injunctive judgment is not final for separation of powers purposes fundamentally contradicts the logic of Plaut, which states that it is "[t]he rules of finality, both statutory and judge made" that confer "the immunity from legislative abrogation" of final judgments. 514 U.S. at 228, 230. That is, for separation of powers purposes, the rules of finality are the same as they are for any other purpose. Until the enactment of § 3626(b)(2), Congress had not created different finality rules for injunctive and other judgments, and no such distinction is drawn in the Federal Rules of Civil Procedure. Plaut prohibits Congress from imposing new finality rules on existing judgments after the fact.

Other courts that have upheld § 3626(b)(2) have done so on grounds that are both invalid and exceptionally dangerous to the constitutional allocation of power among coordinate branches.[11] They have relied on an analogy to Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855) ("Wheeling Bridge II"), in which a statute declaring a bridge to be a post road and authorizing its continued existence was held to trump a prior injunction against maintaining or reconstructing the bridge.

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11. See Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 183-87 (3d Cir. 1999); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 656-57 (1st Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 2366 (1998); Gavin v. Branstad, 122 F.3d 1081, 1086-88 (8th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 2374 (1998); Plyler v. Moore, 100 F.3d 365, 371 (4th Cir. 1996), cert. denied, 520 U.S. 1277 (1997).

This analogy is false. In Wheeling Bridge II, Congress had done nothing with respect to the court's judgment. Rather, Congress had simply altered the substantive legal rights that the injunction enforced -- legal rights that, unlike the constitutional rights asserted in the instant cases, were entirely within Congress's power.[12] The judiciary then declined to continue to enforce these now nonexistent rights. When legislation alters the underlying law "to make legal what the decree was designed to prevent," an equity court obviously should exercise its discretion to alter its own judgments. Rufo, 502 U.S. at 388; see System Fed'n v. Wright, 364 U.S. 642 (1961) (holding that consent decree barring union shops should be modified to reflect statutory amendment legalizing union shops). That is far different from Congress's action in the PLRA, which directly mandates the termination of existing prospective injunctions without eliminating or altering the underlying constitutional rights. See Taylor, 1999 WL 402748, at *___ ("The important thing about Wheeling Bridge II is that it was the Court that made this decision, exercising its discretion, not Congress that directed the court to reopen and terminate, applying newly enacted standards."); Benjamin v. Jacobson, 172 F.3d 144, 175-79 (2d Cir. 1999) (Calabresi, J., concurring).

The question of the limits on Congress's power to require reopening of injunctive judgments is important not just for jail litigation, but for all litigation, and indeed for how the nation governs itself. Over the past several decades scores of bills have been introduced to nullify, formally or informally, politically unpopular federal judicial action in

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12 Wheeling Bridge II involved a bridge over a navigable river, a subject over which Congress has "paramount power." Bridge Co. v. United States, 105 U.S. 470, 475, 480 (1881). By contrast, Congress lacks "the power to determine what constitutes a constitutional violation," and it cannot "enforce a constitutional right by changing what the right is." City of Boerne v. Flores, 521 U.S. 507, ___, 117 S. Ct. 2157, 2164 (1997). Constitutional rules can be changed only through "the difficult and detailed amendment process contained in Article V." Id. at 2168.

areas such as abortion rights, school prayer, and public school desegregation.[13] Until the PLRA, none were passed. Now that the line has been crossed, if the Court upholds § 3626(b), one can expect further efforts to curtail the judiciary's actions on behalf of other unpopular constituencies and causes.[14] It is worth considering whether the nation's public schools could ever have been desegregated had Congress thought, and the courts agreed, that it could pass statutes like § 3626(b) to reopen desegregation decrees, demanding new findings and erecting other new obstacles to the implementation of adjudicated rights.[15]

Nor can the effects of upholding § 3626(b) be limited to civil rights litigation. Injunctive relief generally and consent decrees in particular are widely used in litigation concerning anti-competitive business

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13. See Lawrence G. Sager, Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17 (1981); Theodore Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498, 499 (1974).

14. Presently pending is S. 248, 106th Congress, 1st Sess., which at § 3 would impose similar termination provisions on all civil actions involving prospective relief binding state or local officials, specifically including relief entered before the date of enactment.

15. The many injunctions entered after Brown v. Board of Educ., 347 U.S. 473 (1954), to integrate the public schools presumably did not recite that they were "narrowly drawn," "extend[ed] no further than necessary to correct the violation of the Federal right," or were "the least intrusive means necessary to correct" the violation. Had Congress enacted a "School Desegregation Litigation Reform Act" after Brown, district courts would have had to hold new proceedings, make new findings, and enter new injunctions -- notwithstanding this Court's clear direction to proceed immediately with desegregation. Nor would that necessarily have been the end. Congress could have fashioned additional requirements, such as findings that the injunctive order was consistent with principles of comity and federalism, or with the retained sovereignty of the States; and it could have continued to add new demands requiring new proceedings, perpetuating uncertainty and undermining the authority of the judiciary indefinitely.

practices, environmental protection, securities regulation, labor relations, and private commercial matters. See, e.g., Marc I. Steinberg, SEC and Other Permanent Injunctions -- Standards for their Imposition, Modification and Dissolution, 66 Cornell L. Rev. 27, 63 (1980) (noting that the SEC resolves about 90 per cent of its cases by consent); 4 Milgram on Trade Secrets (Matthew Bender) § 15.02[1][a] (1996) ("Injunctive relief is the most commonly sought form of relief in trade secret litigation."); Gerstein & Mayer, The Federal Circuit Balancing Act: Preliminary Injunctions in Patent Cases, 1 Patent Litigation 456 PLI/Pat at 621-23 (1996) (noting that injunctions are common in patent litigation). In fact, there are many commercial enterprises whose identifiable intangible assets and good will include prospective restraints on others, e.g., agreements prohibiting a former employee from violating a non-competition clause. See Accounting Trends and Techniques (American Institute of Certified Public Accountants, 50th ed.) at 196-200 (1996) (surveying accounting of intangible assets, including non-competition agreements, as assets by 600 large corporations). Such agreements are commonly enforced by injunctions. See, e.g., IAK Productions, Inc. v. Wiza, 986 F.2d 1080 (7th Cir. 1993).

To allow the decision below to stand will put all injunctions up for legislative grabs and thereby set the stage for re-creation of the very scenario this Court described in Plaut: "The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression." 514 U.S. at 219. If § 3626(b)(2) is deemed constitutional, Congress will become the court of last resort for those disappointed litigants who have the resources and the contacts to lobby for legislative reversal of final injunctive decisions, in the guise of retroactive adjustment of federal court remedies.

B. Due Process

Section 3626(b), in its retroactive application, destroys expectations freely bargained for and fixed in judicial judgment. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994). This principle finds expression in several constitutional sources, including the Ex Post Facto Clauses, the Takings Clause, the prohibition on bills of attainder, and the Due Process Clauses. Id. at 266.

In accordance with this principle, judgments have long been viewed as a form of property protected from governmental divestment:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment, the power of the legislature to disturb the rights created thereby ceases.

McCullough v. Virginia, 172 U.S. 102, 123-24 (1898); accord Hodges v. Snyder, 261 U.S. 600, 603 (1923); Memphis v. United States, 97 U.S. 293, 296 (1877). McCullough remains good law. See, e.g., Johnston v. Cigna Corp., 14 F.3d 486, 490-91 (10th Cir. 1993), cert. denied, 514 U.S. 1082 (1995).

In Dougan v. Singletary, the Eleventh Circuit summarily rejected this vested rights argument. It stated: "[A] decree, unlike a money judgment, is subject to later adaptation to changing conditions. Legislative modification of the law governing the decree thus does not impermissibly divest the inmates of any vested rights." 129 F.3d at 1426-27.

No decision of this Court, however, supports the proposition that a judgment's adaptability negates the vested rights doctrine, and at least one appeals court has explicitly rejected it: "On this view, however, there are no 'rights' of any kind, and every decision fixing interests in property is forever malleable. We doubt that the Supreme Court would take that view unless it is willing to overrule Hodges, O'Grady, and Wheeling & Belmont Bridge and jettison the doctrine." Tonya K. v. Board of Educ., 847 F.2d 1243, 1248 (7th Cir. 1988) (Easterbrook, J.).[16]

Property interests that are defeasible only under defined circumstances are common in the law. See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985) (holding that a public employee who could be fired for "misfeasance, malfeasance, or nonfeasance in office" nonetheless had a property right in his employment); Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) ("The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"). Logan, in particular, shows that the possibility of future loss or modification does not exclude an interest from the purview of due process, since it held that a cause of action -- which a litigant has no guarantee of winning at all -- is nonetheless "a species of property protected by the Fourteenth Amendment's Due Process Clause." 455 U.S. at 428. Such contingencies do not rob a judgment of its character as property; they simply mean that the property interest has certain limitations, understood at the time it arises. It cannot be taken by government in a way that is inconsistent with those limitations or otherwise irrational.[17] Cf. Eastern Enters. v. Apfel, 524

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16. The references are to Hodges v. Snyder, 261 U.S. 600 (1923); United States v. O'Grady, 89 U.S. (22 Wall) 641 (1875); and Wheeling Bridge II, supra.

17. In this connection, this Court observed in Plaut that "Rule 60(b), and the tradition that it embodies, would be relevant refutation of a claim that reopening a final judgment is *always* a denial of property without due process." 514 U.S. at 233 (continued...)

U.S. 498, ___, 118 S. Ct. 2131, 2153, 2158-60 (1998) (holding that retroactive imposition of a liability "not calibrated either to Eastern's past actions or to any agreement -- implicit or otherwise -- by the company" violated the Takings Clause; noting the similarity of takings and due process analysis).

Litigation rules that retrospectively change the consequences of past decisions may deny due process. Newsweek, Inc. v. Florida Dept. of Revenue, 522 U.S. 442 (1998) (holding that litigant who relied on availability of tax refund proceeding was denied due process when court ruled it should have sought a pre-payment remedy). More generally, litigation rules that operate irrationally to extinguish legal claims may deny due process. Logan, 455 U.S. at 434-35 (holding that dismissing claim as untimely, where state agency had failed to act on jurisdictionally necessary administrative remedy within limitations period, denied due process).

Section 3626(b)(2) presents the same kind of arbitrariness challenged in Newsweek and Logan. With respect to the November 1994 and March 1995 *Consent Decrees*, petitioners resolved their constitutional claims by consent under the law then applicable. The judgments -- petitioners' property -- were understood to be terminable only under the equitable standards reflected in Rufo and Dowell. The PLRA, however, applies completely different standards to the continuation of the judgments, standards whose *retroactive* application denies petitioners any meaningful ability to act to protect their rights or to bargain for a different agreement that would meet the new standards. Had plaintiffs had notice when they settled the case that the PLRA

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17. (...continued)
(emphasis added). Petitioners do not argue that such reopening *always* denies due process. Rather, it must be done consistently with "Rule 60(b), and the tradition that it embodies," rather than by retroactive legislative fiat.

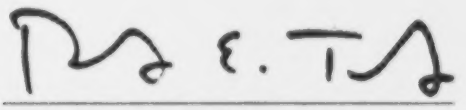
standards would be applied, they could have bargained for a very different agreement -- for example, one that provided greater benefits for a shorter period of time, or a private settlement agreement that is not barred or truncated by the PLRA.

There is nothing more irrational or arbitrary than changing the rules of litigation after the fact, when a party cannot take steps to protect his or her interests. When the result of such retroactive action is to extinguish a cause of action or, *a fortiori*, the more concrete property right embodied in a judgment, the government's action denies due process. The unfairness of § 3262(b)(2)'s application to petitioners' consent judgments, along with the fundamental separation of powers questions that the provision raises generally, warrants this Court's review.

CONCLUSION

For the foregoing reasons, petitioners urge this Court to grant their petition for a writ of certiorari.

Respectfully submitted,



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DATED: July 2, 1999

APPENDIX

A-1 to A-18	Loyd v. Alabama Department of Corrections, No. 98-6189, ___ F.3d ___, 1999 WL 331874 (11th Cir. May 26, 1999)
A-19 to A-20	Loyd v. Herring, Civil Action No. 92-N-0058-NE (entered Jan. 27, 1998)
A-21 to A-40	*Consent Decree* (entered Nov. 7, 1994) (Excerpts)
A-41 to A-42	*Permanent Injunction* (entered Jan. 12, 1995)
A-43 to A-49	*Consent Decree* (entered Mar. 17, 1995)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6189

D. C. Docket No. CV92-N-0058-NE

JEFFREY LOYD, BRUCE CAPSHAW, et al.,
Plaintiffs-Appellants,

versus

ALABAMA DEPARTMENT OF CORRECTIONS,
MICHAEL HALEY, COMMISSIONER,
Defendants-Cross-Defendants-Appellees,

LYLE HAAS, Administrator of the Jackson County
Department of Health in his official capacity,

Defendant-Appellee,

J.D. ATKINS, Jackson County Commissioner; et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(May 26, 1999)

Before BIRCH and BARKETT, Circuit Judges, and ALAIMO,
Senior District Judge.

BIRCH, Circuit Judge:

Appellants, representing all prisoners who are or will be confined at the Jackson County Jail in Scottsboro, Alabama, appeal the district court order terminating: (1) a 1994 consent decree governing the conditions of confinement at the Jackson County Jail, (2) a 1995 permanent injunction ordering the state to remove state inmates from the Jackson County Jail in a timely manner, and (3) a 1995 consent decree governing the responsibilities of the state of Alabama in removing state prisoners from Jackson County jails.

I. BACKGROUND

On November 7, 1994, the district court entered an order approving and adopting a consent decree concerning the conditions of confinement at the Jackson County Jail. The parties to that consent decree included the appellants, Jackson County, the Jackson County Commissioners, the Jackson County Sheriff, and the Chief Jailor of the Jackson County Jail. On January 12, 1995, the district court entered a permanent injunction against the Alabama Department of Corrections, ordering the timely removal of state prisoners from the Jackson County Jail. On March 17, 1995, the district court entered an order adopting and approving a second consent decree concerning the removal of state prisoners from county jails, signed by the appellants, the Commissioner of the Department of Corrections, the Department of Corrections, the Alabama Department of Public Health, and the Administrator of the Jackson County Health Department. On July 2, 1997, the Attorney General and the Commissioner of the Alabama Department of Corrections (hereinafter collectively referred to as the "Attorney General") filed a motion to terminate the consent decrees and the permanent injunction pursuant to the Prison Litigation Reform Act

("PLRA"), codified at 18 U.S.C. § 3626(b)(2).[1] The Attorney General claimed status as an intervenor under 18 U.S.C. § 3626(b)(2) of the PLRA and as a representative of the Alabama Department of Corrections and the Department of Public Health. On January 27, 1998, the district court granted the Attorney General's motion for termination of both consent decrees and the permanent injunction.

The appellants argue that the Attorney General does not have standing to intervene to terminate the 1994 consent decree because the state of Alabama was not a party to that consent decree. They also challenge the decision of the district court not to hold an evidentiary hearing on the motion to terminate. The appellants further contend that the termination provisions of the PLRA under 18 U.S.C. § 3626(b)(2) are unconstitutional.

We review de novo a district court's judgment on intervention as of right. See Purcell v. BankAtlantic Fin.Corp., 85 F.3d 1508, 1512 (11th Cir.1996). We review the district court's denial of an evidentiary hearing for abuse of discretion. See United States v. Fernandez, 136 F.3d 1434, 1438 (11th Cir.1998). Questions of constitutional law we review de novo. See Pleasant-El v. Oil Recovery Co., 148 F.3d 1300, 1301 (11th Cir.1998).

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[1] **Immediate termination of prospective relief.** – In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

18 U.S.C. § 3626(b)(2).

II. DISCUSSION

A. Intervention by the Attorney General

The appellants argue that the Attorney General did not possess the standing to intervene and file a motion to terminate the 1994 consent decree because the Attorney General was not a party to the decree. As an initial matter, we note that this circuit has held that "a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit." Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir.1989).[2] See also Cox Cable Communications, Inc. v. United States, 992 F.2d 1178, 1181 (11th Cir.1993). We, therefore, need not inquire into the Attorney General's standing to seek intervention in this case.

Under Federal Rule of Civil Procedure 24, a party may seek to

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[2] Citing Diamond v. Charles, 476 U.S. 54, 106 S. Ct. 1697, 90 L.Ed.2d 48 (1986), the appellants argue that the Supreme Court has decided that intervenors are required under Article III to possess standing as a matter of constitutional law. This is not so. In Diamond, the Court stated that an intervenor, unless otherwise demonstrating Article III standing, may not initiate an appeal if the party on whose side he intervened has decided not to appeal. Id. at 68, 106 S. Ct. at 1706. The Court left open the question of "whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III." Id. at 68-69, 106 S. Ct. at 1707. Here, appellants, not the State, initiated the appeal of the district court's order terminating the consent decrees. While ambivalent about their position, the county defendants have remained active in opposing the appeal of the district court's order terminating both consent decrees and the permanent injunction. See Brief of (County Defendant) Appellees, at 6-8. Accordingly, there is an existing "case or controversy."

intervene of right[3] or with the permission of the district court.[4] A movant must establish the following requirements to intervene as of right:

> (1) his application to intervene is timely; (2) he has an interest relating to the property or transaction which is the subject of the action; (3) he is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) his interest is represented inadequately by the existing parties to the suit.

Chiles, 865 F.2d at 1213.

No party has challenged the timeliness of the Attorney General's intervention. We focus instead on whether the Attorney General has sufficient "interest" in the existing suit to make intervention proper. The intervenor must be "at least a real party in interest in the transaction which is the subject of the proceeding. This interest has also been described as a direct, substantial, legally protectable interest in the proceedings." Worlds v. Department of Health & Rehabilitative Servs., 929 F.2d 591, 594 (11th Cir.1991) (per curiam) (footnotes, citations, and quotation marks omitted). Here, the 1994 consent decree states in Section D, titled "Population," that:

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[3] "Upon timely application anyone shall be permitted to intervene in an action ... when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated at the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2).

[4] See Fed. R. Civ. P. 24(b).

> Inmates in the Jackson County Jail who have been sentenced to imprisonment in the custody of the Alabama Department of Corrections shall be transferred from the existing and new jail, and accepted by the Department of Corrections, on a timely basis. A timely basis shall be defined as within 30 days of the time the necessary documents associated with the inmate's sentence and transfer have been completed and forwarded to the Department of Corrections. The Jackson County Sheriff shall enlist the assistance of the Jackson County Circuit Judges and District Judge, as well as the assistance of the Circuit Clerk, to ensure timely preparation and forwarding of these documents. Defendants shall inform the monitor of all unreasonable delays in the preparation and forwarding of these documents.

R5-117, 1994 Consent Decree at ¶ 25(g). The decree orders that state inmates will be transferred from county to state jails within a specified period of time, impacting the economic ability of the State to have facilities available for the transfer. The 1994 consent decree thus directly affects the interests of the State of Alabama, even though the State is not a party to the consent decree.

Furthermore, Alabama was a party to the initial suit. The fact that certain parties formed a consent decree does not eliminate the State's interest in the suit. As the Supreme Court stated:

> Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree

> between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor.

Local Number 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501, 529, 106 S. Ct. 3063, 3079, 92 L.Ed.2d 405 (1986). Both consent decrees and the preliminary injunction arise out of the same litigation. It strains reason to argue now that these orders are so unrelated that a defendant to the initial litigation cannot now act as an intervenor.

Under the third and fourth factors described in Chiles, when the interests of the State are affected by the 1994 consent decree, prohibiting the State from intervening would impair the State's ability to protect its interests. See Chiles, 865 F.2d at 1213.[5] Alabama, therefore, satisfies the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)(2). Once a party establishes all prerequisites to intervention, the trial court has no discretion to deny the intervention. See Purcell, 85 F.3d at 1512.

The appellants argue that because the Attorney General did not specifically invoke Federal Rule of Civil Procedure 24 in his motion to terminate, the attempt to intervene must fail.[6] The

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[5] Additionally, Alabama's interest are not adequately represented by either the appellants or the county defendants. While both the State and the county were defendants in the initial action, they are, in reality, adverse parties because the county wants to relieve overcrowding of its jails by ensuring that state inmates are transferred to state jails.

[6] A party wishing to intervene must file a motion stating the grounds for intervention, even when intervention is permitted by statute. Fed. R. Civ. P. 24(c).

Attorney General stated in its motion to terminate that it was intervening under 18 U.S.C. § 3626(b)(2). Here, the Attorney General did not file a motion to intervene, but rather filed only a motion to terminate the consent decree. Without expressly considering the intervention issue under Rule 24, the district court did, however, rule on the Attorney General's motion to terminate. In Farina v. Mission Investment Trust, 615 F.2d 1068 (5th Cir.1980), we held that it is within the discretion of the district court to treat a motion to remove as a motion to intervene. Since the district court granted the motion to remove, the circuit court concluded that the court necessarily had accepted the intervenor as a party in the suit. Id. at 1075.[7] Accordingly, we find that it was within the discretion of the district court here to rule upon the motion to terminate as if the State also had filed a formal motion to intervene. Furthermore, we have also held that we will "disregard nonprejudicial technical defects" in complying with Rule 24(c). See Piambino v. Bailey, 757 F.2d 1112, 1121 (11th Cir.1985).[8] Therefore, we affirm the district court's granting to the Attorney General intervenor status by accepting, and ruling upon, its motion to terminate the 1994 consent decree.[9]

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[7] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[8] When considering intervention of right, prejudice to existing parties -- other than that caused by would-be intervenor's failure to act promptly -- is not a factor to be considered. See Stallworth v. Monsanto Co., 558 F.2d 257, 265 (5th Cir.1977).

[9] In affirming the district court's acceptance of the Attorney General's intervention we do not dismiss lightly the appellants' concerns here. Our holding is based on the compelling nature of the State's interest in the litigation, in that the 1994 consent decree directly affected the State of Alabama by ordering the removal of state inmates from county prisons within a certain period of time.

We note with concern, however, the case of Clark v. Patterson, Civil Action No. CV 78-C5010-NE (N.D. Ala.), see Brief of Appellant, at 16-17, where

the Attorney General of Alabama attempted to represent the views of the Sheriff of Madison County, Alabama, apparently without the sheriff's knowledge or permission. The State of Alabama may not intervene in a misguided effort to represent an adverse party. See Kozak v. Wells, 278 F.2d 104, 113 (8th Cir.1960) (Blackmun, J.) ("courts must be on guard against the improper use of the intervention process.... The procedural rules herein expressed are not to be taken advantage of where ... the motion for leave to intervene is sham.").

We depart company with the dissent on the issue of the scope of the interest of the State of Alabama. We read Chiles to hold that the State of Alabama does not need to establish Article III standing in order to intervene in this case. Chiles requires "a justiciable case and controversy between the parties already in the lawsuit," 865 F.2d at 1213; that provision is satisfied here. The county defendants supported Alabama's motion to terminate the consent decree and have participated as a party supporting that positing on appeal. This is in marked contrast to Diamond, as cited by the dissent, where the State of Illinois filed only a "letter of interest" expressing support for the intervenor's position. 476 U.S. at 63-64, 106 S. Ct. 1697. The county defendants have done a great deal more here. They are appellees and have chosen to pursue the matter as an active party in the litigation, filing briefs on appeal. Moreover, Diamond considers the ability of a party to initiate an appeal and specifically did not consider the requirements for intervention at the district court level. See 476 U.S. at 68-69, 106 S. Ct. 1697. Initiation of an appeal is not at issue here.

Furthermore, the interests of Alabama were affected by the November 1994 consent decree because the success of the decree hinged on reducing the number of inmates in the county facility. To reduce the number of inmates, the consent decree ordered Alabama to remove state inmates in a timely manner. Other portions of the consent decree directed the county defendants to improve the services available to the prison inmates. The facilities, services, and conditions for the old and new county jails mandated by the 1994 consent decree could only be achieved and maintained with a smaller prison population, making Alabama a key party to the success of the November 1994 consent decree. The Supreme Court has noted that when some parties to a litigation resolve their claims through a consent decree, this does not eliminate the interests of "nonconsenting intervenors" whose "claims remain and may be litigated by the intervenor." See Local Number 93, 478 U.S. at 529, 106 S. Ct. at 3079.

It would be difficult, if not impossible, to keep in effect, as the dissent suggests, the provisions of the decree relating to services while not enforcing those provisions instructing Alabama to reduce the prison population. The decree is not

B. Evidentiary Hearing

The appellants argue that it was an abuse of discretion for the district court to refuse to conduct an evidentiary hearing concerning the current conditions at the prison and the scope of the prospective relief that the Attorney General wished to terminate. We agree.

The PLRA grants the district court broad authority to terminate prospective relief upon a motion by any party or intervenor. See 18 U.S.C. § 3626(b)(2). There is, however, an important limitation on this authority. Section 3626(b)(3) provides that

> Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

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made up of two separate pieces, each of which can survive on its own. In this situation, the decree must be read in its entirety. Newman v. Graddick, 740 F.2d 1513 (11th Cir.1984), cited by the dissent, is not in conflict with our decision here. Newman requires that the intervenor show the decree has "adversely affect[ed] his interest." Id. at 1517. The Attorney General has satisfied that demonstration here. Finally, as we have noted, "[a]ny doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action." Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir.1993).

18 U.S.C. § 3626(b)(3) (emphasis added). It would read all meaning out of this section to force the party opposing termination to show that the consent decree meets the requirements of § 3626(b)(3) and then not provide that party with the opportunity to present evidence on that point. We hold, therefore, that it was abuse of discretion for the district court to refuse to hold an evidentiary hearing. See also Tyler v. Murphy, 135 F.3d 594, 597-98 (8th Cir.1998) (on remand proponents of prospective relief must be given opportunity to present evidence); Benjamin v. Jacobson, 124 F.3d 162, 179 (2d Cir.1997) (record may include supplemental evidence presented to the court), reh'g en banc granted, Dec. 23, 1997; Jensen v. County of Lake, 958 F. Supp. 397, 406-07 (N.D. Ind.1997) (at hearing on termination, prisoners "will have the opportunity to show whether ongoing constitutional violations exist" at the jail); Carty v. Farrelly, 957 F. Supp. 727, 733 (D.V.I.1997) (holding evidentiary hearing to determine whether constitutional violations were current and ongoing).

The Attorney General argues that no evidentiary hearing was necessary because the "record" in this case was current. It is true that the court-appointed monitor, Dr. William E. Osterhoff, did provide eleven reports to the court, the most recent of which was filed two months prior to the motion to terminate. The Attorney General's argument fails, however, because the purpose of an evidentiary hearing is far greater than simply to receive a written report. A report alone cannot be cross-examined or disputed. The party opposing termination must be given the opportunity to
challenge or supplement the findings of the monitor and to present evidence concerning the scope of the challenged relief and whether there are "current and ongoing" violations of federal rights in the prison.

C. Permanent Injunction

Section 3626(b)(2) provides for the immediate termination of any prospective relief under certain conditions. The PLRA defines "prospective relief" to mean "all relief other than compensatory monetary damages." 18 U.S.C. § 3626(g)(7). "Relief" is defined as "all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements." 18 U.S.C. § 3626(g)(9).
Accordingly, permanent injunctions, as a form of prospective relief, fall under the immediate termination provisions of the PLRA. We have previously affirmed the termination of an injunction under this same section of the PLRA. See Parrish v. Alabama Dep't of Corrections, 156 F.3d 1128, 1129 (11th Cir.1998). See also Tyler v. Murphy, 135 F.3d 594, 596 (8th Cir.1998) (holding that an injunction must be considered under restrictions of 3626(b)(2)).[10]

Appellants argue that the permanent injunction at issue here is based on findings of constitutional violations, and because a court is not authorized to grant injunctive relief against a state agency that is broader than necessary to remedy the constitutional violation, see Gibson v. Firestone, 741 F.2d 1268, 1273 (11th Cir.1984), the permanent injunction, by definition, is narrowly tailored to correct any constitutional violations and thus complies with requirements of the PLRA.

Since we have determined that it was improper for the district court to refuse to hold an evidentiary hearing concerning conditions in the prison or scope of relief approved in the litigation, we decline to

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[10] It is not unusual for a court to modify or even terminate an injunction in response to a change in the law. See Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431-32, 15 L.Ed. 435 (1855). See also Agostini v. Felton, 521 U.S. 203, 117 S. Ct. 1997, 2006, 138 L.Ed.2d 391 (1997) ("A court errs when it refuses to modify an injunction or consent decree in light of [statutory or decisional law] changes.").

address this portion of the appeal here. Rather, we will allow the district court to review appellant's arguments during the evidentiary hearing ordered in this opinion.

D. Constitutionality of PLRA, 18 U.S.C. § 3626(b)

In a companion case, Nichols v. Hopper, 173 F.3d 820 (11th Cir.1999), we held that the termination provisions of the PLRA are constitutional under a separation of powers challenge as articulated in United States v. Klein, 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1871). In Dougan v. Singletary, 129 F.3d 1424 (11th Cir.1997) (per curiam), cert. denied, --- U.S. ----, 118 S. Ct. 2375, 141 L.Ed.2d 743 (1998), we held that the PLRA termination provision did not violate the Fifth Amendment's Due Process Clause, id. at 1426-27; did not violate the equal protection component of the Fifth Amendment, id. at 1427; and did not violate the separation of powers doctrine, id. at 1426.[11] The appellants' challenges to the constitutionality of the PLRA termination provisions, therefore, are without merit.

III. CONCLUSION

We AFFIRM the district court's treatment of the Attorney General as an intervenor. We REVERSE the district court's decision not to hold an evidentiary hearing and REMAND to the district court to hold a hearing consistent with this opinion. We AFFIRM the district court's finding that the PLRA withstands constitutional scrutiny.

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[11] In Dougan, the plaintiffs challenged section 3626(b)(2) under the separation of powers doctrine that forbids legislation that "command[s] the federal courts to reopen final judgments," as articulated most recently in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219, 115 S. Ct. 1447, 1453, 131 L.Ed.2d 328 (1995).

AFFIRMED in part, REVERSED in part, REMANDED.

BARKETT, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that Loyd was entitled to an evidentiary hearing in the district court and that his constitutional challenge to the PLRA must fail under our precedents. However, I believe that the majority errs in holding that the Attorney General was entitled to seek termination of the entire November 1994 decree without satisfying Article III standing requirements.

There is no question that the Attorney General would be a permissible intervenor in a case where one of the parties to a consent decree also sought termination. Intervention in that context would not require a showing of Article III standing. Chiles v. Thornburgh, 865 F.2d 1197, 1212-13 (11th Cir.1989). Here, however, the Attorney General alone asked the district court to terminate the November 1994 decree. The parties to the decree, the county defendants, did not and have not sought to join the Attorney General's motion to terminate or independently move to terminate the decree. The Supreme Court's decision in Diamond v. Charles, 476 U.S. 54, 106 S. Ct. 1697, 90 L.Ed.2d 48 (1986), indicates that the Attorney General must satisfy Article III standing requirements in these circumstances.

In Diamond, noting Article III's requirement of injury-in-fact, the Court observed that, because of the profound effect of judicial review on the populace, "the decision to seek review must be placed 'in the hands of those who have a direct stake in the outcome.' It is not to be placed in the hands of 'concerned bystanders,' who will use it simply 'as a vehicle for the vindication of value interests.' " Id. at 62, 106 S. Ct. 1697 (citations omitted).

Accordingly, the Court held that "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Article III." Id. at 68, 106 S. Ct. 1697. Because the defendant in that case, the State of Illinois, had not filed an appeal, the intervenor could not simply attempt "to ride 'piggyback' on the State's undoubted standing," id. at 64, 106 S. Ct. 1697, but had to show that he had satisfied Article III's demands in order to appeal since "in the absence of the State [as an appellant], there is no case for Diamond to join." Id. See also United States v. AVX Corp., 962 F.2d 108, 112-13 (1st Cir.1992) (holding that intervenor who opposed consent decree could not appeal the district court's order approving the decree without satisfying Article III standing requirements). The same result obtains here. Because the Attorney General alone asked the district court to terminate the Nov 1994 consent decree, it must show that it has a direct stake in whether or not that consent decree will continue in force. Accordingly, the majority errs in concluding that the Attorney General was entitled to seek termination of the consent decrees without satisfying Article III standing requirements.

Our decision in Chiles is not to the contrary. In Chiles, we recognized that a party seeking to intervene need not establish Article III standing "as long as there exists a justiciable case or controversy between the parties already in the lawsuit." Chiles, 865 F.2d at 1213. Here, however, at the time the Attorney General moved to terminate the consent decrees, there was no ongoing case or controversy between the parties to the decree -- the case between them had been settled by the consent decree that the Attorney General was seeking to terminate. Moreover, the fact that the county defendants acquiesced in the termination of the consent decrees before both the district court and this Court is not sufficient to create a case or controversy. The Supreme Court rejected a

similar contention in Diamond. In Diamond, the State of Illinois filed a "letter of interest" expressing its support for the intervenor's position and noting that it was still a "party" to the litigation. The Court found that this "mere expression of interest . . . insufficient to bring the State into the suit as an appellant," explaining that "[t]he State's general interest may be adverse to the interest of appellees, but its failure to invoke our jurisdiction leaves the Court without a 'case' or 'controversy' between appellees and the State of Illinois." Diamond, 476 U.S. at 63-64, 106 S. Ct. 1697. The same principle applies here. Because the county defendants did not invoke the district court's jurisdiction and move to terminate the decrees, there was no case or controversy between the plaintiffs and the county defendants at the time the Attorney General filed the motion to terminate.

The majority concludes that the Attorney General has a sufficient direct and substantial interest in the November 1994 consent decree, even though he was not a party to the decree, because one of the paragraphs of the consent decree requires transfer of inmates from county jails to state-run jails within a specified period of time. I agree that the Attorney General has a direct stake in the continued existence of this portion of the consent decree. I do not think, however, that the fact that the Attorney General has a direct stake in one provision of this consent decree, albeit an important one, gives him the right to seek the termination of the entire decree, the vast majority of which only relates to the county defendants. The majority offers no reason why the Attorney General should be able to seek termination of those portions of the decree that only relate to the county defendants. Moreover, as the majority recognizes, the state and county defendants have different and adverse interests, making it inappropriate for the Attorney General to act as a representative for the county defendants.

This reasoning finds support in our decision in Newman v. Graddick, 740 F.2d 1513 (11th Cir.1984). In Newman, we considered whether the Attorney General of Alabama had standing to challenge a consent decree to which he had not agreed and whether he could seek modification of that decree. Because the Attorney General was a party to the decree and the decree was approved over his objections, we held that he had standing to challenge the decree. However, we explained that "he would need to show that the decree adversely affects his interests as Attorney General of Alabama. He could not assert the interests of other parties to the litigation." Id. at 1517. Likewise, we affirmed the district court's conclusion that the Attorney General "had no standing to seek to modify the decree in respects that were not prejudicial to the interest of the Attorney General." Id. at 1518. As Newman makes clear, the Attorney General's standing is confined to his own interests; he cannot assert the interests of other parties to the litigation. See also Graddick v. Newman, 453 U.S. 928, 934, 102 S. Ct. 4, 69 L.Ed.2d 1025 (1981) (Powell, J.) (denying stay to Alabama Attorney General on basis that he lacked standing because, at the time, Alabama statutes vested responsibility over prison system in the Governor, who opposed stay).

I recognize that, even if the Attorney General lacks the authority to terminate the remaining portions of the November 1994 decree, the district court would have the authority to do so sua sponte. See United States v. City of Miami, 2 F.3d 1497, 1506 (11th Cir.1993). However, I believe that the district court should have an opportunity to decide whether it will exercise its discretion to act sua sponte, especially given the fact that its decision on this point will affect the scope of the evidentiary hearing it needs to hold. This follows the same approach we took in Magluta v. Samples, 162 F.3d 662 (11th Cir.1998), where we remanded a case

to the district court to permit the district court to decide whether it would dismiss plaintiff's case for failure to comply with the local rules. Id. at 664-65.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JEFFREY LOYD, et al.	]	
	]	
Plaintiffs,	]	
	]	
vs.	]	CV-92-N-0058-NE
	]	
TOMMY HERRING, et al.	]	
	]	ENTERED
Defendants.	]	Jan. 27 1998

ORDER

On January 27, 1998, the court conducted a hearing on the July 2, 1997, motion to terminate the two consent decrees and the permanent injunction pursuant to the Prison Litigation Reform Act, filed by the Attorney General of Alabama and the Commissioner of the Department of Corrections; and the January 13, 1998, petition for order to show cause why the commissioner of the state of Alabama Department of Corrections should not be held in contempt, filed by the defendants and cross-claimants.

Upon due consideration of the arguments by counsel at the hearing and argument contained in their respective briefs, it is hereby **ORDERED, ADJUDGED** and **DECREED**:

1 . The motion to terminate the two consent decrees and the permanent injunction is **GRANTED**. Accordingly, the consent decrees entered by the court on November 7,1994, and March 17,1995, respectively, and the permanent injunction entered January

12,1995, are **VACATED**.

2. The automatic stay provision of the PLRA, § 3626(e)(2), provides that prospective relief shall be automatically stayed beginning 30 days after a motion to terminate is filed. Specifically, the statute provides: "Any prospective relief subject to a pending motion shall be automatically stayed during the period . . . beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b) [the PLRA's termination provision]." This provision has subsequently been amended to permit postponement of the effective date of an automatic stay by 60 days for good cause. *See Department of Justice Appropriations Act*, 1998, Pub.L. No. 105-119, § 123(a)(3)(C), 111 Stat. 2440, 2470 (1997). Because the motion to terminate in this case was filed on July 2, 1997, approximately 156 days ago, the consent decrees and preliminary injunction have been automatically stayed by the PLRA for several months now. As a result, the January 13, 1998, petition for order to show cause why the commissioner of the state of Alabama Department of Corrections should not be held in contempt is **DENIED**.

Done, this 27th of January, 1998.

s/ Edwin L. Nelson
EDWIN L. NELSON
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JEFFREY LOYD, etc., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 91-N-58-NE
	)	
TOMMY HERRING, etc., et al.,	)	
	)	
Defendants.	)	

Approved and
adopted Nov. 7, 1994

CONSENT ORDER

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[Table of Contents omitted]

I. DEFINITIONS

1. The terms "Plaintiffs" and "inmates" refer to all inmates who are now or will be in the future incarcerated in the Jackson County Jail.

2. The term "Defendants" refers to Jackson County; the Jackson County Commission, and Commission members Houston Kennemer, Ralph Eustace, Buddy Harris, Eddie Smith, and J.D. Atkins; Sheriff Mike Wells; Jackson County Jail Administrator O.Z. Brown; and their agents, officers, successors in office, employees and all persons acting in concert or participation with them.

3. The term "State Defendants" refers to the Alabama Department of Corrections and Tommy Herring as Commissioner of the Alabama Department of Corrections, and his successors in office.

4. The term "existing jail" refers to the jail located on the second floor of the county courthouse in Scottsboro, Alabama, and shown in Appendix A.

5. The term "new jail" refers to the jail to be constructed in Jackson County, Alabama, as provided for in this proposed consent order (hereinafter "Order"), which will be ready for occupancy and will take the place of the existing jail as soon as reasonably possible, but no later than twenty-four (24) months after this order is entered by the court.

6. The term "jail" refers to the existing jail and the new jail.

7. The term "qualified health care personnel" shall refer to physicians, dentists and other professional and technical workers who are properly licensed to engage in activities that support, complement, or supplement the functions of physicians or dentists or both, and who are licensed, registered or certified as is appropriate to their qualifications to practice. Further, they can only practice within their licenses, certification or registration.

8. The term "health trained staff member" refers to correctional officers and other personnel without health care licenses who are trained in limited aspects of health care as determined by a licensed physician, or other appropriate certifying official.

II. BACKGROUND

9. This settlement arises out of a class action lawsuit concerning the conditions of confinement at the existing Jackson County Jail. The case was certified as a class action on behalf of all inmates who are now or in the future will be incarcerated in the Jackson County Jail. This proposed consent order is substituted by the parties for the one previously submitted to the court in March 1993.

10. The parties agreed to attempt to resolve this action without further litigation. After discussions between the parties, this Order was agreed upon as a resolution of Plaintiffs' request for injunctive and declaratory relief.

11. Only the Plaintiffs and the Defendants identified in paragraph two are parties to this order. Claims involving all other parties to this lawsuit, including the State Department of Cor-

rections, Commissioner Tommy Herring, the Jackson County Health Department, and its administrator, Lyle Haas, remain unresolved.

III. GENERAL PROVISIONS

12. Policies, practices, procedures, services and privileges discussed below apply to both the existing and the new jail. Where the physical limitations of the existing jail facility require modification of particular policies, practices, procedures, services, and privileges, this has been noted in the provision. Where action is to be taken with regard to inmates entering the jail, such action shall also be taken with regard to all inmates currently at the jail.

IV. SUBSTANTIVE PROVISIONS
A. NEW JAIL

13. The Defendants shall finance, design, construct and maintain a new jail facility to replace the existing Jackson County Jail. The new jail shall be completed and take the place of the existing jail as soon as reasonably possible, but no later than twenty-four (24) months after the date this Order is entered by the court. If the Defendants fail to comply with this provision, the court may, on its own or upon motion by the Plaintiffs, impose any sanctions or additional relief, including but not limited to monetary penalties and further reductions in the population of the existing jail. In addition to the provisions set out specifically in this Order, the new jail and any additions shall be built and operated to provide, at a minimum, the following:

a) at least two (2) fire exits remote from each that are accessible from each living unit;

b) all furnishings, mattresses, cushions that are used in

the jail are subjected to careful fire safety evaluation before purchase or use;

c) an intake/booking areas that is accessible to the following:

   i. a shower;
   ii. a sally port;
   iii. drinking water;
   iv. a storage area for inmates' personal property;
   v. a telephone;
   vi. interview spaces;
   vii. operable toilets and wash basins;

d) at least two (2) single occupancy rooms that are available for the continuous monitoring of seriously ill, mentally disordered, injured or nonambulatory inmates;

e) separate housing for males and females;

f) a separate dayroom leisure-time space for each cell-block, detention room cluster or housing unit;

g) a space outside the cell or room that is provided for inmate exercise;

h) a space for religious services, educational programs and visiting;

I) equal opportunity for males and females to participate in programs and services;

j) conformity with all applicable federal, state, and local building codes;

k) housing of handicapped inmates in a manner that provides for their safety and security;

l) indoor or outdoor exercise areas each of which provide a minimum of fifteen (15) square feet per inmate;

m) that the jail is accessible to the public and accessible

to and usable by handicapped persons.

All cell areas shall allow for continuous observation by staff and shall include:

a) a locker per each occupant;
b) natural light;
c) toilet and shower facilities;
d) a bed at above floor level, desk or writing space, and a stool, per each occupant;
e) Noise levels that, measured by a sound level meter using the A-scale weighing (dBA), do not exceed seventy (70) decibels in daytime and forty-five (45) decibels at night.

14. Housing in the new jail shall comply with the following provisions:

a. Unencumbered floor space, as used in this and other paragraphs in this Order, shall be defined as usable space that is not encumbered by furnishing or fixtures. At least one dimension of the unencumbered space shall be no less than seven feet. In determining unencumbered space in a cell or room, the total square footage (measuring from interior wall to interior wall) is obtained and the square footage of all fixtures and equipment is subtracted. All fixtures and equipment must be in operational position and must provide the following minimum areas per person: bed, plumbing, fixtures (if inside the cell or room), desk, locker, and chair or stool.

b. Total floor space, as used in this and other paragraphs in this Order, shall be defined as cell space measured from interior wall to interior wall, including the space occupied by fixtures and equipment.

c. In measuring the unencumbered as well as the total floor space available to each inmate, only the cell in which an inmate is housed, and not any dayroom or other area to which he has temporary access each day, shall be counted.

d. All single-occupancy cells in which inmates are confined shall have at least thirty-five (35) square feet of unencumbered floor space for a single cell occupant. Such cells shall have at least seventy (70) square feet of total floor space for a single cell occupant when confinement exceeds ten (10) hours per day for the occupant. The new jail shall be designed to provide single occupancy cells for, at minimum, one-third of the maximum population.

e. Written policies, procedures, and practices shall provide that single-occupancy cells/rooms shall be available for the following categories of inmates when indicated by the classification system, medical diagnosis, or other professional conclusions: inmates with severe medical disabilities; inmates suffering from serious mental illness; sexual predators; inmates likely to be exploited or victimized by others; and, inmates who have other special needs for single occupancy housing. Single cells shall be required for inmates assigned to maximum and close custody, but also may be used for inmates assigned to minimum or medium custody.

f. Multiple occupancy cells shall house no more than fifty (50) inmates, each of whom is screened prior to admission for suitability to group living. All multiple-occupancy cells in which inmates are confined shall have at least twenty-five (25) feet of unencumbered floor space for each occupant. Confinement in multiple occupancy cells shall not exceed ten (10) hours a day under normal conditions. Sleeping area partitions are required if more than four (4) inmates are housed in one sleeping area.

g. A dayroom shall be adjacent to each cellblock, detention room cluster, or housing unit. Each dayroom in the new

jail shall provide at least 35 square feet of total floor space per inmate. No dayroom shall have less than 100 square feet of total floor space.

h. A classification system shall be used to separate occupants into groups that reduce the probability of assault and disruptive behavior. At a minimum, the classification system shall evaluate the following: mental and emotional stability, escape history, history of assaultive behavior, medical status, age, and enemies of record. Medium security inmates housed in multiple occupancy cells and rooms require direct supervision or direct continuous visual observation of inmates by staff. Male and female inmates shall be housed in separate cells and rooms.

i. The design and operation of the new jail shall be in compliance with applicable provisions of the Americans with Disabilities Act.

j. The new jail shall be designed to accommodate physical plant expansion, if necessary.

15. Inmates housed in the new jail shall have access, 24-hours a day, to an above-floor toilet and an operable wash basin with thermostatically controlled hot and cold running water, including potable drinking water. Each single-occupancy cell in the new jail shall have one such toilet and one such wash basin. Multiple-occupancy cells shall have no fewer than one wash basin for every twelve (12) inmates and no fewer than one toilet for every twelve (12) inmates in male facilities and one toilet for every eight (8) inmates in female facilities. Urinals may be substituted for up to one-half of the toilets in male facilities.

16. Inmates housed in single-occupancy cells in the new jail shall have access, at least once a day, to an operable shower with hot and cold running water. Each multiple-occupancy cell in the new jail shall have at least one such shower for every eight (8)

inmates.

B. STAFFING/TRAINING

17. To provide for the security of the jail, for inmates' access to staff, for programs and services, and for the safety of the inmates, the jail shall be staffed with enough officers to maintain services and the safety and security of the jail. The jail staff shall include at least one (1) female officer whenever a female inmate is present in the jail. At least one (1) male officer also shall be on duty on all three shifts of each day. Dispatcher positions shall not be considered as jail officer positions in either the old jail or the new jail.

18. In the new jail, at least two (2) officers shall be assigned per shift, one of whom is free to leave the control desk. In addition to the staff described in paragraph 17, there must be sufficient staff on duty to perform all necessary procedural functions of the jail and implement the terms of this Order. Sufficient staff shall be hired and trained such that the required staffing levels can be maintained even during periods of staff illness and vacation.

19. Defendants shall establish a training program either in-house or through an outside agency which all present and future jail staff shall be required to complete. Present staff members who have already completed this training shall not be required to repeat it under this section. Both pre-service and annual in-service training shall be required for all jail staff.

20. Training shall include at a minimum:

a. training in all substantive areas covered by this Order,

including but not limited to, health screening, suicide detection and prevention, mental health and drug and alcohol related emergencies, security procedures, first aid, classification of inmates, disciplining of inmates, supervision of inmates, use of force, use of chemical agents, inmate rules and regulations, rights and responsibilities of inmates, fire and emergency procedures, key controls, basic counseling techniques, and prevention of sexual harassment; and

b. training on implementation of this Order and the policy and procedure manual described in paragraph 22.

21. All present staff shall be required to complete eighty (80) hours of training within a year. Those present staff members who have already completed such training shall be certified as having done so by either the sheriff or jail administrator. All future staff shall be required to complete eighty (80) hours of training as soon as practicable, but in all cases within six (6) months of their job assignment. Each year thereafter, present and future staff shall be required to complete a minimum of twenty-four (24) hours of training per year, with at least forty (40) hours of training being preferred.

C. POLICIES AND PROCEDURES

22. Defendants shall develop and implement written policies and procedures which at a minimum cover each substantive area of this Order and conform with all federal, state and local laws and standards.

23. Defendants shall develop and provide all incoming inmates with an inmate handbook containing rules and regulations

based on the provisions of this Order. Inmates who are not able to read shall have communicated to them the substance of the inmate rules and regulations as set out in the handbook within twenty-four (24) hours of arrival at the jail. In addition to informing the inmates about the inmate rules and regulations of the jail, the handbook shall describe generally describe the criminal justice procedure and schedule in Jackson County. The handbook shall also state that the jail is being run pursuant to a court order and shall indicate that copies of the Order are available in the law library. The names and addresses of the Plaintiffs' lawyers and the court-appointed monitor shall be included in the handbook. (The role and method of appointment of the monitor is discussed in paragraph 139).

D. POPULATION

24. To remedy problems at the existing jail and prevent overcrowding at the new jail, Defendants shall make a good faith effort to implement alternatives to incarceration. The alternatives to incarceration shall include programs for both pre-trial and sentenced inmates. The Defendants agree to seek the assistance of an agency or organization specializing in alternatives to incarceration.

25. To remedy problems at the existing jail, Defendants shall undertake the following measures:

a. As shown on Appendix A, "Bullpen 1" refers to the housing area, closest to the elevator, that includes a "Dayroom" and three, adjacent "M.O. Cells" (multiple-occupancy cells). As shown on Appendix A, "Bullpen 2" refers to the housing area, farthest from the elevator, that includes the jail's other "Dayroom" and three other, adjacent "M.O. Cells."

b. No more than seventy-two (72) inmates shall ever be housed in the existing jail at any time. The "women's cell," as shown in Appendix A, shall house no more than two (2) persons at any time. Persons confined in the "10 Man Cell" or the "Trustee Cell," as shown in Appendix A, shall not be confined to their cell more than ten (10) hours a day. Bunks shall not be added to cells to increase the number of persons to be housed in a given cell beyond the rated capacity of that cell.

c. To the extent consistent with public safety, Defendants shall, generally, keep the inmate population as low as possible, and more specifically, shall reduce the average daily population in the jail, for each calendar month, to sixty (60); reduce the average daily population of "Bullpen One," for each calendar month, to eighteen (18); and reduce the average daily population of "Bullpen Two," for each calendar month, to eighteen (18).

d. Monthly reports (which are discussed further in paragraph 139) by Defendants to the court, the monitor, and Plaintiffs' counsel shall include the daily inmate populations of the jail and the steps that Defendants took to reduce the population on or with respect to those days on which the population of the existing jail exceeded (60), or the population of either "Bullpen One" or "Bullpen Two" exceeded eighteen (18). In addition to such reports, for each day that the existing jail's population exceeds sixty (60) inmates, the Defendants shall provide prompt, written notice of this fact, as well as of the measures that are being taken to reduce the population, to the monitor, Plaintiffs' counsel, the Jackson County Circuit Court Judges, the Jackson County District Court Judge, the Jackson County District Attorney, and the Jackson County Circuit Clerk. Copies of such written notice also shall be provided to each Defendant personally.

e. Defendants shall also form an inmate population reduction committee consisting of Jackson County criminal justice officials to help monitor and control the inmate population.

f. County inmates housed at the Scottsboro Police Department Jail shall not be considered as part of the existing jail's population for the purposes of the above population caps.

g. Inmates in the Jackson County Jail who have been sentenced to imprisonment in the custody of the Alabama Department of Corrections shall be transferred from the existing and new jail, and accepted by the Department of Corrections, on a timely basis. A timely basis shall be defined as within 30 days of the time the necessary documents associated with the inmate's sentence and transfer have been completed and forwarded to the Department of Corrections. The Jackson County Sheriff shall enlist the assistance of the Jackson County Circuit Judges and District Judge, as well as the assistance of the Circuit Clerk, to ensure timely preparation and forwarding of these documents. Defendants shall inform the monitor of all unreasonable delays in the preparation and forwarding of these documents.

26. No inmate shall be required to sleep on the jail floor. No inmate shall be required to sleep in the dayrooms for any period of time. Under staff supervision the dayrooms may be used to provide some exercise opportunities if necessary and not inconsistent with the other provisions of this Order.

27. The cell in the existing jail known as the "drunk tank," as shown on Appendix A, may be used as a temporary holding cell but no inmate shall be housed in it for more than eighteen (18) hours.

E. FIRE SAFETY

. . . .

F. HEATING/COOLING/VENTILATION/LIGHTING

. . . .

G. SANITATION/MAINTENANCE/PEST CONTROL

. . . .

H. HYGIENE

. . . .

I. FOOD SERVICE

. . . .

J. EXERCISE AND RECREATION

. . . .

K. RELIGIOUS SERVICES

. . . .

L. MEDICAL CARE

. . . .

M. SPECIAL NEEDS MANAGEMENT

1. Suicide/Mental Illness

. . . .

2. Intoxication

. . . .

3. Sexual Assault

. . . .

4. Pregnancy

. . . .

N. SECURITY AND CONTROL

. . . .

O. CLASSIFICATION

. . . .

P. DISCIPLINARY PROCEDURES

. . . .

Q. INMATE COMMUNICATION

. . . .

1. Visitation

. . . .

2. Mail

. . . .

3. Telephones

. . . .

R. ACCESS TO COURTS

. . . .

S. GRIEVANCE PROCEDURE

. . . .

T. INMATE WORKER SYSTEM

. . . .

U. NON-DISCRIMINATION

. . . .

V. COMPLIANCE

139. Except where otherwise specifically indicated, the Defendants shall implement or initiate implementation of all provisions of this Order within forty-five (45) days of the signing of the Order. Defendants shall make monthly reports on their efforts to comply with this Order until such time as all provisions of this Order have been implemented. These reports shall be provided to Plaintiffs' attorneys, the monitor, and such other parties as the court may direct. The court shall, as soon as practicable, appoint a qualified, neutral individual as a monitor to evaluate and report on the progress of the Defendants in complying with each of the provisions of this Order. The monitor shall be entitled to a reasonable fee for this work, which shall be taxed as part of the costs to the Defendants in this case. The exact manner in which the monitor will be selected and his or her duties will be determined by the court after consultation with the parties.

140. Counsel for the Plaintiffs shall have access to copies of all documents which relate to the implementation of this Order. Counsel for the Plaintiffs shall have access to all records and recordings which relate to the implementation of this Order. Counsel for the Plaintiffs shall be allowed access to any inmate, during regular business hours and upon reasonable notice to the jail staff. Upon reasonable notice to Defendants' counsel, counsel for the Plaintiffs shall have access to all willing staff and all facilities as necessary to address issues affected by this Order. The Defendants' counsel may be present at any meeting between Plaintiffs' counsel and a staff member.

W. JURISDICTION

141. This Court has jurisdiction over the subject matter of this action and the parties hereto.

142. The Court shall retain jurisdiction in this case to ensure that this Order and all plans incorporated herein are fully implemented. After a reasonable period of time, but in no event less than one year after the new jail is built and occupied, Defendants may petition to court to end jurisdiction by showing they are in compliance with this order.

X. NOTICE

143. The Defendants shall immediately explain the terms of this Order to all of their agents, servants, representatives and employees in any way connected or potentially involved with the jail, including jail staff and sheriffs' deputies, in order to ensure their understanding of the requirements of this Order and the necessity for strict compliance therewith. All jail staff members and other individuals providing services required by this Order shall sign a statement indicating that they have read and understood this Order; such statements shall be retained by the Defendants. The Defendants shall require strict compliance with this Order by their respective employees, agencies, assigns, or successors.

144. The Defendants shall provide notice of this Order's terms to all members of the Plaintiff class by posting, within ten (10) days of the signing of this Order and monthly thereafter as made necessary by the removal or destruction of posted copies. In the existing jail the Order shall be posted accordingly; five (5) full copies in the booking room, two (2) summarized copies in the halls where inmates receive visitors, one (1) copy in the women's cells, one (1) copy in the ten-man cell, one summarized copy in each of the one-man cells, one (1) copy in the holding cell or "drunk tank," and one (1) summarized copy in each dayroom. In the new jail the Order shall be posted accordingly; five (5) full copies in the law library, two (2) summarized copies of this Order in the visiting

room and notices of the Order in each cell-block area. The pages of the full and summarized copies shall be covered with sheet protectors. The cover page of each posted full or summarized copy of the Order shall include the names and addresses of Plaintiffs' counsel. Those notices that are posted monthly because of the removal or destruction of previously-posted notices shall be provided to Defendants by Plaintiffs' counsel. In addition to the general posting of the Order, the inmate handbook described herein shall advise inmates of the fact that the jail is being operated under the terms and conditions of an Order entered by the United States District Court for the Northern District of Alabama, and that upon request, any inmate shall be provided access to a copy of the complete Order.

Y. DISPUTE RESOLUTION

145. If the Plaintiffs believe that the Defendants are in violation of any part of this Order, they shall notify the Defendants and the monitor of the alleged violation. The Defendants shall have 10 days from the time of written notification to respond in writing to the Plaintiffs and the monitor. If, after that 10-day period has expired, the parties are unable to resolve any differences, they may submit them to the monitor for mediation. After 30 days have elapsed from the submission to the monitor (or, by agreement of the parties, at an earlier date), any issues remaining unresolved may be submitted to the court for resolution.

146. Plaintiffs shall retain the right to seek additional fees and costs, beyond any agreed to through the date of the entry of this Order, if Plaintiffs obtain a favorable ruling from the court on any dispute with respect to the Defendants' compliance with this Order.

Z. ATTORNEYS FEES

147. The parties to this Order recognize that, for the purposes of awarding attorney's fees, the Plaintiffs are prevailing parties. Further, the parties have settled this issue, agreeing upon the amount of attorney's fees and costs due to the Plaintiffs. This amount has been paid.

Consent to the entry of the preceding order is hereby granted, this the 22nd day of September, 1994.

s/_____
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Chairman
Jackson County Commission

s/_____
RALPH EUSTACE
Commissioner
Jackson County

s/_____
BUDDY HARRIS
Commissioner
Jackson County

s/_____
EDDIE SMITH
Commissioner
Jackson County

s/_____
O.Z. BROWN
Jail Administrator
Jackson County

[Appendices omitted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JEFFREY LOYD, et al.	]	
	]	
Plaintiffs,	]	
	]	
vs.	]	CV-92-N-0058-NE
	]	
TOMMY HERRING, et al.	]	
	]	ENTERED
Defendants.	]	Jan. 27 1998

Permanent Injunction

Upon due consideration, the court being fully informed in the premises, it is hereby **ORDERED, ADJUDGED** and **DECREED:**

1. From this day forward, every inmate housed at the Jackson County, Alabama, jail, old and new, who has been sentenced to the custody of the Alabama Department of Corrections shall, within thirty (30) days of the date on which the necessary documents associated with such inmate's conviction, sentence, and transfer have been completed and forwarded to the Department of Corrections, be transferred in the usual manner from the physical custody of the Jackson County, Alabama, sheriff to the physical custody of the Alabama Department of Corrections;

2. If any inmate, described in paragraph 1 above, has not been transferred to the physical custody of the Alabama Department of Corrections within thirty-five (35) days of the date on which the necessary documents associated with such inmate's conviction,

sentence, and transfer have been completed and forwarded to the Department of Corrections, the sheriff of Jackson County, Alabama, his successors in office, and those working under his direction or control or in concert with him, are **DIRECTED** and **ORDERED** to deliver such inmate to the nearest penal facility operated by the Alabama Department of Corrections and to transfer such inmate to the physical custody of the person in charge of such facility;

3. The Commissioner of the Alabama Department of Corrections, his successors in office, and those working under his direction or control or in concert with him, are directed to take such affirmative steps as may be necessary to affect the transfer of each inmate described in paragraph 1 hereof within the time prescribed. In the event that the sheriff of Jackson County, Alabama, is required to implement the provisions of paragraph 2, the Commissioner of the Alabama Department of Corrections, his successors in office, and those working under his direction or control or in concert with him, are **DIRECTED** and **ORDERED** to accept each such inmate who is delivered to a facility of the Alabama Department of Corrections and to pay to the sheriff of Jackson County, Alabama, the sum of $50.00 per day for each day over thirty days that any such inmate has remained in the Jackson County, Alabama jail.

Done, this 12th of January, 1995.

s/ Edwin L. Nelson
EDWIN L. NELSON
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JEFFREY LOYD, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 91-N-58-NE
	)	
TOMMY HERRING, et al.,	)	
	)	
Defendants.	)	

Approved and
adopted Mar. 17, 1995

CONSENT DECREE BETWEEN PLAINTIFFS AND TOMMY HERRING, THE ALABAMA DEPARTMENT OF CORRECTIONS, THE ALABAMA DEPARTMENT OF PUBLIC HEALTH AND LYLE HAAS, ADMINISTRATOR OF JACKSON COUNTY HEALTH DEPARTMENT

The Plaintiffs and the above-named Defendants hereby submit to the Court a consent decree, subject to approval by the Court in accordance with Rule 23 of the Federal Rules of Civil Procedure. This consent decree resolves the action involving the Plaintiffs and the above-named Departments and any other named defendants who work for either the Department of Corrections or the Jackson County Health Department. This consent decree does not resolve any disputes involving the Plaintiffs and the other named defendants.

I. Definitions

1. The terms "Jackson County Jail" and "jail" shall refer to the current Jackson County Jail and any future jail in Jackson County in Jackson County Alabama.

2. The terms "Plaintiffs" and "prisoners" shall refer to the class of all individuals who are now or in the future will be confined in the Jackson County Jail.

3. The term "Defendant" or "Defendants" shall refer to Lyle Haas, Administrator of the Jackson County Health Department in his official capacity and his successors in office and the Alabama Department of Health. Additionally, the term "Defendant" or "Defendants" shall refer to Tommy Herring in his official capacity as Commissioner of the Alabama Department of Corrections and his successors in office and the Alabama Department of Corrections.

II. Background

4. This settlement arises out of a class action lawsuit concerning the conditions of confinement at the existing Jackson County Jail in Scottsboro, Alabama. The suit was certified as a class action on July 6, 1992, on behalf of all inmates who are now or in the future will be incarcerated in the Jackson County Jail.

II. General Provisions

5. Venue is proper under 28 U.S.C. §§ 1391 and 1392(a).

6. The Plaintiffs and Defendants agree to attempt to resolve this action without further litigation. After discussions between the parties, this Consent Decree [hereinafter referred to as "Decree"] was

agreed upon as a resolution of Plaintiffs' request for injunctive and declaratory relief.

7. The Defendants do not concede nor admit liability, but recognize the desirability of ending the litigation by this Decree.

8. This Decree may be modified (a) by the written agreement of both parties, subject to court approval, or (b) by court order pursuant to the Federal Rule of Civil Procedure 60(b)(5) due to a legal or factual change that evokes a grievous wrong.

IV. Substantive Provisions

9. Defendants shall comply with the Code of Ala. 1975 Sections 22-3-2 (4), 22-3-5 (1), (3), 22-11A-17 and 14-6-80 et seq., as these provisions relate to the Department of Corrections, the County Boards of Health, and with the Guidelines for Inspection of prisons and jails issued by the State Departments of Corrections and Public Health respectively.

10. Alabama Department of Corrections' employees shall personally observe and inspect every area of the Jackson County Jail where inmates are allowed and mark each item on the DOC Jail Inspection Report. Further, the Alabama Department of Corrections shall continue the practice of documenting each inspection and submitting the results of the jail inspection to the county sheriff and county commission. Employees of the Jackson County Health Department shall continue to inspect the jail and continue to note any health and sanitation conditions which violate then existing guidelines as issued by the Alabama Department of Public Health. The Defendants shall continue the practice of documenting each inspection and submitting the results of the jail inspection to the county sheriff and county commission.

11. The DOC Inspector shall inform the Jackson County Commission and the Jackson County Sheriff in writing of the steps necessary to correct, abate, or remove any unsatisfactory condition that the inspection finds. Further, the Alabama Department of Corrections shall have jail inspectors review annually all previous jail inspections submitted during the year and one prior health inspection report and one prior fire marshall report of the Jackson County Jail to determine if there is repeated documentation of unrepaired conditions and if an unsatisfactory condition is repeated on two consecutive DOC Jail Inspection Reports, notice shall be sent to the Jackson County Commission and the Jackson County Sheriff that the condition should be corrected, abated, or removed.

12. The Defendants shall provide Plaintiffs' counsel with inspection reports and any recommendations made by the inspectors of the Jackson County Jail for a period of five years and thereafter extended for good cause. Further, the Defendants shall provide Plaintiffs' counsel guidelines, reports, or regulations issued by the Alabama Department of Health or Department of Corrections which effect prisons and jails that have not been previously provided in discovery of this case for a period of five years and thereafter extended thereafter for good cause.

13. The Alabama Department of Corrections' Inspector shall spot check inmate files to ensure that each file contains at a minimum a completed intake health screening form.

14. The Jackson County Health Department Inspector shall inspect and report any insanitary conditions found at the jail and make recommendations in writing to the Jackson County Commission and the Jackson County Sheriff. Said inspector shall review at least annually all previously submitted inspection reports for the year to determine if any insanitary condition is repeated on

two consecutive reports and if a violation if repeated, said inspector shall request in writing to the county commission that the violation be corrected, abated, or removed.

15. The Jackson County Health Department Inspector shall note the lighting of the jail on his or her inspection report.

16. In conducting the inspection of the jail, the Jackson County Health Inspector shall use the Guidelines for the Inspection of Prisons and Jails as revised. (see attachment)

17. The Jackson County Health Department Inspection shall continue to note whether a comfortable and well-ventilated environment exists. Any noted deficiencies shall continue to be documented and reported to the County Commission and County Sheriff's Office.

18. The Jackson County Health Inspector shall continue to notify the Jackson County Commission and/or the Jackson County Sheriff if flies, roaches, rodents or other vermin are noted in numbers which constitute a health hazard.

19. The Jackson County Health Department shall require:

a. the screening of all inmates for symptoms of tuberculosis;

b. the testing of all jail staff for tuberculosis at least once annually or upon exposure to infectious tuberculosis.

c. the tuberculosis testing of all inmates sentenced for thirty or more days.

d. recommend that inmates testing positive for tuberculosis disease be isolated from other inmates.

20. It is understood and agreed by the parties hereto that the actual screening and testing of inmates and jail staff as referenced in paragraph 19 shall be the responsibility of the County Defendants pursuant to paragraphs 56 and 57 of the Consent Decree entered into by the County Defendants and the Plaintiffs approved by Judge Edwin L. Nelson on November 7, 1994.

V. Attorneys' Fees

21. The Plaintiffs shall be considered prevailing parties and shall be entitled to an attorney fee of $5,000 from the Alabama Department of Public Health and $5,000 from the Department of Corrections.

22. Entered into on this the 21st day of December, 1994.

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(2)

No. 99-248

In the Supreme Court of the United States

JEFFREY LOYD, ET AL., PETITIONERS

v.

ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in permitting the Attorney General of Alabama to seek termination, pursuant to Section 802(a) of the Prison Litigation Reform Act of 1995 (PLRA), 18 U.S.C. 3626(b)(2) (Supp. IV 1998), of a consent decree to which no state agency was a party, when the State was a party to the action in which the decree was entered, and the decree imposed obligations on a state agency.

2. Whether 18 U.S.C. 3626(b)(2) (Supp. IV 1998) of the PLRA violates the doctrine of separation of powers or deprives petitioners of vested property rights without due process of law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Benjamin v. *Jacobson*, 172 F.3d 144 (2d Cir.), cert. denied, 120 S. Ct. 72 (1999)	9-10
Berwanger v. *Cottey*, 178 F.3d 834 (7th Cir. 1999)	9
Diamond v. *Charles*, 476 U.S. 54 (1986)	8-9
Dougan v. *Singletary*, 129 F.3d 1424 (11th Cir. 1997)	11, 12, 13
Gavin v. *Branstad*, 122 F.3d 1081 (8th Cir. 1997), cert. denied, 118 S. Ct. 2374 (1998)	10, 11, 12, 13
Graver Tank & Mfg. Co. v. *Linde Air Prods. Co.*, 336 U.S. 271 (1949)	9
Hadix v. *Johnson*, 133 F.3d 940 (6th Cir.), cert. denied, 118 S. Ct. 2368 (1998)	10, 11, 12, 13
Imprisoned Citizens Union v. *Ridge*, 169 F.3d 178 (3d Cir. 1999)	10
Inmates of Suffolk County Jail v. *Rouse*, 129 F.3d 649 (1st Cir. 1997), cert. denied, 118 S. Ct. 2366 (1998)	10, 12-13
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994)	13
Local 93, Int'l Ass'n of Firefighters v. *Cleveland*, 478 U.S. 501 (1986)	7-8
Mausolf v. *Babbitt*, 85 F.3d 1295 (8th Cir. 1996)	6
Nichols v. *Hopper*, 173 F.3d 820 (11th Cir. 1999)	5

Cases—Continued: Page

Pennsylvania v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) 10, 12
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 10-11
Plyler v. *Moore*, 100 F.3d 365 (4th Cir. 1996), cert. denied, 520 U.S. 1277 (1997) 10, 11, 12, 13
Rufo v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) 11, 13
Sierra Club v. *Morton*, 405 U.S. 727 (1972) 8
Taylor v. *United States*:
143 F.3d 1178 (9th Cir. 1998) 10
158 F.3d 1059 (9th Cir. 1998) 10
181 F.3d 1017 (9th Cir. 1999) 10
Tonya K. v. *Board of Educ.*, 847 F.2d 1243 (7th Cir. 1988) 13
Warth v. *Seldin*, 422 U.S. 490 (1975) 8
Yakus v. *United States*, 321 U.S. 414 (1944) 12

Constitution, statutes and rules:

U.S. Const.:
Amend. V (Due Process Clause) 6, 12, 13
Amend. VIII 12
Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321-66 to 1321-77 (18 U.S.C. 3626 (Supp. IV 1998)) 3
§ 802(a), 110 Stat. 1321-66:
110 Stat. 1321-66 (18 U.S.C. 3626(a)(1)(A) (Supp. IV 1998)) 4
110 Stat. 1321-67 (18 U.S.C.3626(b)(1)(A) (Supp. IV 1998)) 4
110 Stat. 1321-67 (18 U.S.C. 3626(b)(2) (Supp. IV 1998)) 3, 4, 5, 6, 7, 9, 10, 11, 12, 13
110 Stat. 1321-68 (18 U.S.C. 3626(b)(3) (Supp. IV 1998)) 4, 6, 9
§ 802(b)(1), 110 Stat. 1321-70 (18 U.S.C. 3626 note) (Supp. IV 1998) 4
28 U.S.C. 2403(b) 5

Statute and rules—Continued: Page

Ala. Code § 36-15-1(2) (1991) 3
Fed. R. Civ. P.:
Rule 24 3
Rule 24(a)(2) 5, 6, 7, 8
Rule 60(b) 11

In the Supreme Court of the United States

No. 99-248

JEFFREY LOYD, ET AL., PETITIONERS

v.

ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 176 F.3d 1336. The opinion of the district court (Pet. App. A19-A20) is unreported. The consent order approved and adopted November 7, 1994, the permanent injunction entered January 27, 1995 and the consent decree approved and adopted March 17, 1995 are reproduced at Pet. App. A21-A40, A41-A42 and A43-A49, respectively.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1999. The petition for a writ of certiorari was filed on July 6, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1992, petitioners—the class of all inmates who are or will be confined at the Jackson County jail in Scottsboro, Alabama—brought this action against Jackson County and several County officials (collectively County defendants) and the Alabama Department of Corrections, its commissioner, and the Administrator of the Jackson County Department of Health (collectively State defendants), challenging the conditions of their confinement. Pet. 1.[1] The County defendants in turn filed a cross-claim against the Alabama Department of Corrections and its Commissioner. *Ibid.*

In November 1994, the district court entered an order adopting a consent decree which addressed the conditions in the jail and required, *inter alia*, that "[i]nmates in the Jackson County Jail who have been sentenced to imprisonment in the custody of the Alabama Department of Corrections shall be transferred from the existing and new jail, and accepted by the Department of Corrections, on a timely basis." Pet. App. A33. Petitioners and the County defendants were parties to this decree; the State defendants were not. *Id.* at A2.

In January 1995, the district court entered a permanent injunction against the Alabama Department of Corrections, ordering, *inter alia*, that it accept transferred inmates and take any necessary steps to facilitate their transfer. Pet. App. A42. In March 1995,

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[1] The Jackson County Department of Health is a part of the Alabama Department of Public Health. By suing the Administrator of the County Department of Health in his official capacity, petitioners effectively sued the State Department of Public Health as well.

the court approved and entered a second consent decree, requiring the Department of Corrections, its Commissioner, the Alabama Department of Public Health, and the Administrator of the Jackson County Department of Health to inspect and report on the conditions in the Jackson County jail. *Id.* at A43-A49. The Departments of Corrections and Public Health, as well as petitioners and the Administrator of the Jackson County Department of Health, were parties to this decree.

2. In July 1997, following the enactment of the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321-66 to 1321-77, the Attorney General of Alabama and the Commissioner of the Department of Corrections filed a motion to terminate both consent decrees and the permanent injunction, pursuant to the Act, codified in part at 18 U.S.C. 3626(b)(2) (Supp. IV 1998). Pet. App. A2. That provision permits a motion to terminate by a "defendant or intervener."[2] The Attorney General did not specifically invoke Federal Rule of Civil Procedure 24, which governs intervention in an action. He stated that a state statute authorized him to appear in any case in which Alabama has an interest, Ala. Code § 36-15-1(2) (1991), that he represented the Departments of Public Health and Corrections, and that he was intervening pursuant to Section 3626(b)(2) of the PLRA. Pet. App. A2-A3.

Pursuant to the PLRA, a court may not grant or approve prospective relief with respect to prison conditions unless it finds that the relief is "narrowly

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[2] The court of appeals spells "intervenor" with an "o"; the statute spells it with an "e" ("intervener"). Except in quoting from the statute, we use the court of appeals' spelling.

drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary" to correct that violation. 18 U.S.C. 3626(a)(1)(A) (Supp. IV 1998). Section 3626(b)(2) provides for immediate termination of such relief that fails to comply with that standard, upon timely motion of a "defendant or intervener." Prospective relief shall not terminate if the court makes written findings that the relief remains necessary to correct a "current and ongoing violation of the Federal right," and otherwise satisfies the requirements of Section 3626(b)(1)(A). 18 U.S.C. 3626(b)(3) (Supp. IV 1998). A party may seek termination of prospective relief under Section 3626(b) even if the relief "was originally granted or approved before * * * the date of the [PLRA's] enactment of this title." § 802(b)(1), 110 Stat. 1321-70.

In January 1998, the district court granted the Alabama Attorney General and the Commissioner's motion to terminate both consent decrees and the permanent injunction, without an evidentiary hearing on the motion.[3] Pet. App. 19A; *id.* at A3. Petitioners appealed to the Eleventh Circuit, claiming that the Alabama Attorney General lacked standing to intervene to terminate the 1994 consent decree because the State of Alabama was not a party to it, that the district court erred in refusing to hold an evidentiary hearing on the termination motion, and that the PLRA's termination provisions were unconstitutional. *Id.* at A3. The United States intervened to defend the consti-

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[3] The court of appeals held that the district court granted intervenor status to the Alabama Attorney General by accepting and ruling on the termination motion. Pet. App. A8.

tutionality of 18 U.S.C. 3626(b)(2), pursuant to 28 U.S.C. 2403(b)[4].

This court held, with one judge dissenting, that a party seeking to intervene as of right need only fulfill the requirements for intervention set forth in Federal Rule of Civil Procedure 24(a)(2) and need not demonstrate standing to sue, where, as here, there exists a justiciable case and controversy between the parties already in the lawsuit Pet. App. A4. The court analyzed the interests of the Alabama Attorney General and the Department of Corrections collectively, as that of the State, and determined that the State's interest in the 1994 consent decree satisfied Rule 24(a)(2)'s requirements and therefore that the district court properly permitted the intervention of the Alabama Attorney General and the Department of Corrections. *Id.* at A5-A7. Judge Barkett, dissenting, would have held that because none of the parties to the consent decree had moved for its termination, the Alabama Attorney General and the Department were required to satisfy Article III standing requirements. *Id.* at A14-A15.

On the merits, the panel unanimously held that the district court had abused its discretion in refusing to

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[4] At the time it moved to intervene in the present case, the United States had already intervened in a separate Eleventh Circuit appeal presenting the same constitutional issues. *Nichols* v. *Hopper*, 173 F.3d 820 (1999). The United States accordingly did not file a separate brief in this case, but asked the court of appeals to consider the arguments set forth in its brief filed in the related appeal. The court of appeals granted the United States' motion to intervene and agreed to adopt the United States' brief filed in the companion case. C.A. Order allowing U.S. to Intervene (Nov. 18, 1998). The court's docket, however, does not reflect the court's action on the United States' motion for intervention.

conduct an evidentiary hearing pursuant to 18 U.S.C. 3626(b)(3), concerning the current conditions at the Jackson County jail and the scope of prospective relief that the Alabama Attorney General wished to terminate, and remanded for such a hearing. Pet. App. A10. The court rejected petitioners' challenge to the constitutionality of 18 U.S.C. 3626(b)(2), concluding that the provision did not violate the doctrine of separation of powers or the Due Process Clause of the Fifth Amendment to the United States Constitution. Pet. App. A13.

ARGUMENT

1. a. Petitioners challenge the Alabama Attorney General's intervention to terminate the 1994 consent decree, on the ground that neither he, nor the two State agencies which he represents, were parties to it. Pet. 5. They contend that the courts below should have required him to establish standing to intervene, which, they claim, he could not do. Pet. 9-10. They ask this Court to resolve a conflict in the circuits concerning whether a party who seeks to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2) can simply fulfill that Rule's requirements, or whether that party must also have standing. There is a "diversity of views" among the circuits on this question. See *Mausolf* v. *Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996); *Diamond* v. *Charles*, 476 U.S. 54, 68 & n.21 (1986). But because the facts of this case do not squarely present the intervention issue urged by petitioners and because the Alabama Attorney General could in any event establish standing if required to do so, the petition should be denied.

Intervention was not necessary to permit the Alabama Attorney General to appear on behalf of the

state Departments of Corrections and Public Health in the district court, because those Departments were defendants in the lawsuit. Accordingly, the Attorney General's motion is not properly regarded as a motion to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure. Rather, he sought relief in the form of termination of prospective relief on behalf of two agencies that were defendants in the lawsuit who were entitled by the terms of 18 U.S.C. 3626(b)(2) to seek termination of prospective relief.[5] This case may present the question whether a defendant in an action can move to terminate a consent decree entered therein, when he is not a party to the decree, but it does not present the question whether an intervenor must have standing, as stated in the petition. For that reason alone the petition should be denied.

b. Even if the State defendants were regarded as "intervenors" with respect to the 1994 consent decree entered into by the County defendants and the petitioners, and even if this Court were to hold that such intervenors must demonstrate standing, that ruling would afford petitioners no relief in this case. The State defendants have standing to challenge the 1994 consent decree because they were directly affected by it.

Although the Department of Corrections was not a party to the decree, Pet. 5, and therefore the decree could not properly impose obligations on the Department, *Local 93, Int'l Ass'n of Firefighters* v. *Cleveland*,

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[5] In response to an inquiry by the district court concerning which defendants he sought relief on behalf of, the Attorney General stated that he was an "intervenor" under Section 3626(b)(2) and was representing the State Departments of Corrections and Public Health. Pet. 2-3.

478 U.S. 501, 529 (1986), nonetheless the decree expressly required that the Department accept prisoners transferred from the County jail. Pet. App. A33. In addition, the court of appeals found that the State had a sufficient interest to move for termination of the 1994 consent decree as a whole because the improvements in the County jail required by the decree "could only be achieved and maintained with a smaller prison population, making Alabama a key party to the success of the * * * decree." *Id.* at A9 n.9. The court found the decree was "not made up of two separate pieces, each of which can survive on its own." *Id.* at A9-A10 n.9. Thus, the decree did not, as petitioners contend, "impose duties and burdens on the sheriff and the county defendants alone." Pet. 9. The duty to accept prisoners, and the financial and administrative burden imposed on the Department of Corrections as a result, without its consent, amounts to an immediate and personal injury in fact. See *Warth* v. *Seldin*, 422 U.S. 490, 502 (1975); *Sierra Club* v. *Morton*, 405 U.S. 727, 740 (1972). Review is therefore not warranted in this case, because even if petitioners were to prevail in their argument that standing is required, a favorable decision would afford them no relief.[6]

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[6] For the same reasons stated above, this case does not present the question of what "interest" qualifies for intervention pursuant to Rule 24(a)(2). Pet. 11-15. Should this Court regard the State defendants as intervenors and reach that question, their interest qualifies for intervention pursuant to the Rule.

Petitioners' contention that the Alabama Attorney General lacks standing to defend the district court's decision on appeal is likewise meritless. Pet. 10. Petitioners rely on *Diamond*, where the intervenor was the sole appellant. 476 U.S. at 61. That case does not apply here, where petitioners initiated the appeal, not the Alabama Attorney General, and where the County defendants

Although petitioners (Pet. 9, 13-14), and the dissenting judge below (Pet. App. A16), take issue with the findings of the courts below, this Court ordinarily does not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). The Court should not, therefore, grant certiorari to review a judgment that hinges on such factual determinations.

In addition, the case is in an interlocutory posture. The court of appeals has remanded the case for a hearing under 18 U.S.C. 3626(b)(3), as to whether the consent decree should be terminated or modified. Developments in that hearing could change the legal landscape in ways that could affect the need for this Court to decide issues concerning the propriety of the State's role in the preliminary stages of the litigation.[7]

2. a. Petitioners contend that Section 3626(b)(2) of the PLRA violates the constitutional doctrine of separation of powers. This issue does not warrant this Court's review. Seven courts of appeals have concluded, as did the Eleventh Circuit in this case, that Section 3626(b)(2) is constitutional. See *Berwanger* v. *Cottey*, 178 F.3d 834 (7th Cir. 1999); *Benjamin* v. *Jacobson*, 172 F.3d 144 (2d Cir. 1999) (en banc), cert.

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filed a brief in support of the district court's decision on appeal, indicating the existence of a live case or controversy. Cf. *ibid.*; Pet. 10.

[7] The hearing on remand may also illuminate Jackson County's position with respect to termination of the consent decree, Pet. 3, 9; Pet. App. A9, a matter that may bear on the need for intervention by the State defendants, and the necessary showing of interest for any such intervention. Cf. *Diamond* v. *Charles*, 476 U.S. at 61.

denied, 120 S. Ct. 72 (1999); *Imprisoned Citizens Union* v. *Ridge*, 169 F.3d 178 (3d Cir. 1999); *Hadix* v. *Johnson*, 133 F.3d 940 (6th Cir.), cert. denied, 118 S. Ct. 2368 (1998); *Inmates of Suffolk County Jail* v. *Rouse*, 129 F.3d 649 (1st Cir. 1997), cert. denied, 118 S. Ct. 2366 (1998); *Gavin* v. *Branstad*, 122 F.3d 1081 (8th Cir. 1997), cert. denied, 118 S. Ct. 2374 (1998); *Plyler* v. *Moore*, 100 F.3d 365 (4th Cir. 1996), cert. denied, 520 U.S. 1277 (1997).[8] This Court has denied petitions for review in five separate cases raising essentially the same constitutional questions presented by petitioners here; this case does not warrant a different outcome. Accordingly, the petition should be denied.

Petitioners argue (Pet. 16-22) that Section 3626(b)(2) violates the doctrine of separation of powers discussed in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). It does not. *Plaut* held that Congress may not require federal courts to reopen final judgments dismissing claims for monetary relief. *Plaut*, 514 U.S. at 218-219. But *Plaut* did not bar Congress from directing federal courts to modify prospective relief—the relief at issue in this case—to the extent that such relief fails to conform to new legal standards. In fact, *Plaut* reaffirmed the Court's decision in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), which upheld legislation that "altered the prospective effect of injunctions entered by Article III courts."

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[8] A panel of the Ninth Circuit held that Section 3626(b)(2) violates the separation of powers doctrine. See *Taylor* v. *United States*, 143 F.3d 1178 (1998). Thereafter, the Ninth Circuit granted rehearing en banc, and withdrew the panel's decision. See *Taylor* v. *United States*, 158 F.3d 1059 (1998). The Ninth Circuit then issued an en banc decision, with a six-judge majority holding the case moot, without resolving the constitutional issue. See *Taylor* v. *United States*, 181 F.3d 1017 (1999) (en banc).

Plaut, 514 U.S. at 232. The crucial distinction is that final judgments on claims for monetary relief represent "the last word of the judicial department with regard to a particular case or controversy," *id.* at 227; while final judgments granting injunctive relief are always subject to modification or termination in light of a "significant change either in factual conditions or in law," *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992).[9] Therefore legislation that requires courts to reopen final judgments on claims for monetary relief violates the separation of powers doctrine; legislation that requires courts to modify prospective relief in accordance with a change in applicable law does not. *Hadix*, 133 F.3d at 942-943; *Dougan* v. *Singletary*, 129 F.3d 1424, 1426 (11th Cir. 1997); *Gavin*, 122 F.3d at 1085-1088; *Plyler*, 100 F.3d at 371-372.

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[9] Petitioners point out that *Rufo* described an injunctive consent decree as a "final judgment that may be reopened only to the extent that equity requires," see *Rufo*, 502 U.S. at 391, and that Section 3626(b)(2) imposes a new reopening requirement that did not exist when the judgment in this case was pronounced. Pet. 17. But that statement in *Rufo* referred only to the appropriate scope of the modification; the Court readily acknowledged that "[a] consent decree must of course be modified if one or more of the obligations placed upon the parties has become impermissible under federal law." See 502 U.S. at 388. Section 3626(b)(2) simply requires courts to modify a consent decree which orders more extensive relief than is permissible under federal law.

Rufo involved Federal Rule of Civil Procedure 60(b), which authorizes discretionary judicial modification of judgments; while Section 3626(b)(2) requires modification in certain circumstances. But even if injunctions are usually modified at a court's discretion, the fact that they are frequently modified indicates that they are not "the last word of the judicial department" within the meaning of *Plaut*. See *Plaut*, 514 U.S. at 227.

It follows that the Eleventh Circuit's decision holding Section 3626(b)(2) constitutional is correct and does not warrant this Court's review. The PLRA changed the law applicable to cases involving prison conditions: it limited the prospective relief courts could provide to that which was narrowly drawn, least intrusive and extending no further than necessary to correct a violation of federal rights. Section 3626(b)(2) simply requires courts to terminate grants of prospective relief that do not comply with that new legal standard. The provision is therefore fully consistent with the separation-of-powers doctrine set forth in *Plaut* and *Wheeling & Belmont Bridge*. See *Hadix*, 133 F.3d at 943; *Dougan*, 129 F.3d at 1426-1427; *Gavin*, 122 F.3d at 1085-1088; *Plyler*, 100 F.3d at 372.

Petitioners contend that *Wheeling & Belmont Bridge* is distinguishable. That case, they argue, involved a change in the substantive rights of the parties, whereas here Congress directed courts to terminate prospective injunctions without altering the underlying constitutional rights. See Pet. 20 & n.12. That suggested distinction has no constitutional significance. Though Congress has not limited the scope of the Due Process Clause (and lacks authority to do so), it has limited judicial remedial authority, which it has the power to do. See *Yakus* v. *United States*, 321 U.S. 414, 439-440, 442 n.8 (1944). Just as Congress may require a court to alter prospective relief to conform to a change in substantive law, see *Wheeling & Belmont Bridge*, 59 U.S. (18 How.) at 432, it may require a court to alter prospective relief to conform to a change in remedial law. In terms of separation of powers, the two situations are the same. See *Gavin*, 122 F.3d at 1087, see also *Rouse*, 129 F.3d at 65 (relevant underlying law concerns district court's remedial authority, which the

PLRA has limited); *Plyler*, 100 F.3d at 372 (applicable law is not the Eighth Amendment, but district court's authority to grant relief exceeding that required by federal law).

b. Petitioners also contend (Pet. 23-26) that Section 3626(b)(2), in its retroactive application, deprives them of vested rights without due process of law in violation of the Fifth Amendment to the United States Constitution. Prospective orders are, however, always subject to possible modification or termination, and that principle is fully applicable to consent decrees. *Rufo*, 502 U.S. at 378. Therefore, petitioners had no vested property interest protected by the Due Process Clause in the prospective relief embodied in the two consent decrees or the injunction in this case. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 273-274 (1994) (explaining that plaintiff had no vested rights in an injunctive decree); see also *Hadix*, 133 F.3d at 943 n.3; *Dougan*, 129 F.3d at 1427-1428; *Gavin*, 122 F.3d at 1090-1091; *Plyler*, 100 F.3d at 374. *Tonya K.* v. *Board of Educ.*, 847 F.2d 1243 (7th Cir. 1988), cited by petitioners, is not to the contrary. That case suggests that plaintiffs may have vested rights in decisions "fixing interests in property." See *id.* at 1248. It does not establish a property interest in judgments granting prospective relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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